Supreme Court, U.S.
FILED

971935 JUN 1 1998

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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1997

CAL-ALMOND, INC., CARLSON FARMS, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., AND FRAZIER NUT FARMS, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On remand from this Court after the decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), the Ninth Circuit ordered dismissal of petitioners' First Amendment claim without briefing, argument, or a written opinion, despite the fact that both the Ninth Circuit and the Solicitor General had previously acknowledged that petitioners' claim raises issues different from those resolved in *Wileman Bros.* The issue presented is:

Whether a federal agricultural marketing order that confers or withholds a credit against a monetary assessment on the basis of the content of a handler's own brand advertising violates the First Amendment.

RULE 29.6 STATEMENT

None of the petitioners has any parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, four producers and handlers of California almonds, petition for a writ of certiorari to review the summary dismissal of their First Amendment claim by the United States Court of Appeals for the Ninth Circuit. At a minimum, we respectfully request that the Court vacate the order below and remand with instructions to entertain briefing and argument on the features of the statutory scheme that distinguish this case from *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

OPINIONS BELOW

The order of the court of appeals (App. A)[1] on remand from this Court (117 S. Ct. 2501), directing the district court to dismiss petitioners' First Amendment claim, is unreported.

The prior opinion of the court of appeals concerning remedial issues (App. B) is reported at 67 F.3d 874. The order of the district court (App. C) and the judgment of the district court concerning remedial issues (App. D) are unreported.

The initial opinion of the court of appeals (App. E), which addressed the First Amendment question presented herein and remanded the case to the district court for further proceedings on remedial issues, is reported at 14 F.3d 429. None of the four district court orders that were the subject of the initial court of appeals opinion (Apps. F, G, H, and I) are officially reported. Three of those orders (Apps. F, G, and H) are published, however, at 51 Agric. Dec. 44, 85, and 79 (respectively).

The opinions of the Judicial Officer of the Department of Agriculture (Apps. J, K, and L) are reported at 50 Agric.

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[1] References to "App." are to the separately bound volume of the appendix to the petition in this case. Citations to "R." refer to the reporter's transcript in the record compiled below.

Dec. 23, 171, and 183 (respectively).

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1997. A timely petition for rehearing was denied on March 3, 1998 (App. M). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are 7 U.S.C. §§ 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b) and (c). They are reproduced at App. N.

The relevant regulations implementing the Act are 7 C.F.R. §§ 981.30, 981.38, 981.39, 981.40(a), (d) and (e), 981.41, 981.80, 981.81(a), and 981.441 (1992). They are reproduced at App. O.

STATEMENT

A. Advertising Provisions in Federal Marketing Orders

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, as amended, authorizes (among other things) compulsory advertising programs for certain named commodities, administered by industry committees (*id.* §§ 608c(7)(C), 610) and paid by assessments imposed on all handlers of the particular commodities (*id.* § 610(b)(2)(ii)). These advertising programs are of two different types, as set forth in two different subsections of the Code of Federal Regulations for each marketing order adopted by the Secretary of Agriculture (Secretary). The first type, see, *e.g.*, 7 C.F.R. § 981.41, is a mandatory program in which all

handlers pay assessments to their industry boards, which use those assessments to produce and disseminate generic advertising promoting the covered products. This type of program was upheld by the Court last Term in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

The second type, see, *e.g.*, 7 C.F.R. § 981.441, allows handlers a choice: they may either advertise their own products in accordance with restrictions specified by regulations adopted by the Secretary and applied by the industry board, in which case they receive a total or partial credit against their assessments, or they may pay the full assessment to the Board for generic product advertising just as under the mandatory assessment program. The criteria for creditability are content-based and highly restrictive.[2]

This case involves the second type of program. The marketing orders at issue in *Wileman Bros.* were of the first type and did not include any credits or penalties based on the handlers' own brand advertising. For both types, the marketing orders are administered by boards made up of members of the industry appointed by the Secretary. 7 U.S.C. §§ 608c(7)(C), 610.

B. The Almond Marketing Order

Petitioners Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., Carlson Farms, and Frazier Nut Farms, Inc. are "handlers" of California almonds, and as such are subject to the marketing order for California almonds, 7 C.F.R. § 981 (Almond Marketing Order or Order).[3] Their business consists almost entirely of processing

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[2] The criteria applicable to petitioners' advertising are discussed in detail at pages 5-6, *infra*.

[3] We cite to the Almond Marketing Order in effect for the crop years at issue in this case (1980-1981 to 1991-1992), which was (continued...)

and selling almonds for use as ingredients in such products as candy, ice cream, or cereal. App. 39a. As the Ninth Circuit noted in its initial opinion in this case, a single competitor, Blue Diamond, "overwhelmingly dominates the retail market" for almonds (App. 50a-51a); indeed, Blue Diamond, which sells under its brand name, has a 92% market share of almonds sold in grocery stores. App. 51a n.9. The Almond Marketing Order is administered by the California Almond Board (Almond Board or Board), which "has ten members, all of whom are industry representatives appointed by the Secretary." App. 40a. Because of its size, Blue Diamond holds a majority of the ten seats on the Almond Board, and thus controls the Board.[4] R. 135-139; App. 165a.

Like the agricultural marketing orders in *Wileman Bros.*, the Almond Marketing Order authorizes the Board to "fund[] a generic pro-almond public relations program." App. 40a; see Act of Nov. 25, 1970, Pub. L. No. 91-552, §§ 1(1) and (2), 84 Stat. 1357. Unlike the marketing orders at issue in *Wileman Bros.*, however, the marketing order for almonds authorizes a handler to receive a credit against its assessment for amounts it spends in purchasing its own advertising, up to the amount of the assessment used for paid advertising. 7 U.S.C. § 608c(6)(I); 7 C.F.R. § 981.41(c). Under this scheme, as it existed for crops years 1980-1981 through

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(...continued)
codified at 7 C.F.R. Pt. 981 (1992) (App. 368a-380a), unless otherwise noted.

[4] The Almond Marketing Order guarantees Blue Diamond, in its capacity as agricultural cooperative, four seats on the Board regardless of the tonnage it handles, and six seats if it handles more than 50% of all California almonds, 7 C.F.R. § 981.30, which it did during the crop years at issue (App. 165a). In *Wileman Bros.*, no single handler controlled its industry's board.

1991-1992, which are at issue in this case (see note 3, *supra*), a handler could receive credit for advertising its own brand, as well as for generic advertising.[5] 7 C.F.R. §§ 981.41(c), 981.441(c)(3)(i)(A) and (B).

To earn credit, however, the advertising had to satisfy the extensive requirements of the creditable advertising regulations, 7 C.F.R. § 981.441. The Board alone determined whether a handler's advertising satisfied the regulations and was creditable against its mandatory assessment. App. 40a-41a. Under the creditable advertising regulations, "[t]he clear and evident purpose of each advertisement" had to be "to promote the sale, consumption, or use of California almonds." 7 C.F.R. § 981.441(c)(2).

More significantly, the regulations provided that no credit was available for advertising that referred to "more than two complementary branded products"; for advertising that promoted "noncomplementary" products or "competing nuts"; or for advertising that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. § 981.441(c)(5). In addition, under 7 C.F.R. § 981.441(c)(3)(iv):

> When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50% raw shelled almonds by weight, and (C) the almond product displays the handlers' brand.

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[5] Almost all of the assessment imposed by the Board was attributable to the creditable advertising program. The overall assessment on almond handlers was 2.6 cents per pound, and the maximum credit for advertising was 2.5 cents per pound. App. 40a n.1.

The effect of these restrictions was to allow handlers to receive a credit for advertising almonds for retail to consumers but to disallow credits for advertising almonds as ingredients. Under these regulations, for example, petitioner Cal-Almond, Inc., whose domestic sales are almost all for use in ice cream (App. 50a), could not receive credit for its advertising because almonds do not make up 50% of the net weight of the package of ice cream. 7 C.F.R. § 981.441(c)(3)(iv). Similarly, petitioner Saulsbury, which sells almonds to cereal companies, could not receive credit for promoting such cereals (App. 50a). Like Cal-Almond, Saulsbury was forced to pay the entire assessment, which the Board then used to promote retail almond sales, from which Saulsbury received no benefit.

By contrast, Blue Diamond (which controls the Almond Board) could obtain full credit for advertising its own brand, and then benefit a second time when the Board used the assessments paid by producers of ingredient almonds to run "generic" ads promoting the retail sales of almonds for consumption — where Blue Diamond has a 92% market share. As the Ninth Circuit stated, "there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as [petitioners], who sell primary to ingredient manufacturers." App. 53a.[6]

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[6] By the same token, Blue Diamond is the only almond producer that owns its own retail stores, and thus the only producer that can receive credits for advertising directing consumers to retail stores. When petitioner Saulsbury ran advertisements directing consumers to a chain of mini-markets, which sold its almonds in Boise, Idaho, it could not receive credit. App. 50a.

C. The Proceedings Before *Wileman Bros.*

This case arose from administrative petitions filed with the Secretary by petitioners under 7 U.S.C. § 608c(15)(A), which permits handlers to ask the Secretary to modify, or exempt them from, marketing orders that are "not in accordance with law." Petitioners alleged, among other things, that the generic and creditable advertising programs for California almonds violated the First Amendment. App. 162a, 219a-221a.

Upon review of the decisions on the petitions by an administrative law judge, the Judicial Officer of the Department of Agriculture (JO) rejected petitioners' First Amendment challenge. App. 219a-225a, 315a-318a. Petitioners sought review of the JO's decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. § 608c(15)(B). The district court affirmed the JO's decisions. App. 72a-112a, 113a-139a, 140a-147a.

On appeal to the Ninth Circuit, the court reversed in relevant part, holding that both the generic and the creditable advertising programs for California almonds violate the First Amendment. App. 38a-71a.[7] The first question addressed by the court was whether the marketing order "even implicate[s], let alone violate[s], appellant's First Amendment rights." App. 42a. In addressing that question, the court separately analyzed the mandatory assessment program and the creditable advertising program, and although it ultimately concluded that both types of program infringe handlers' First Amendment rights, the reasoning and analysis applicable to each were different.

The Ninth Circuit found that the mandatory assessment program implicated First Amendment rights against compelled

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[7] The court of appeals rejected other challenges by petitioners to the administration of the Almond Marketing Order (App. 53a-70a).

speech and association, reasoning that "'where the government requires *a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.*" App. 43a (emphasis in original), quoting *United States* v. *Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). As to the creditable advertising program, the Ninth Circuit reasoned that it "also would clearly implicate appellants' First Amendment rights, both because it would compel them to speak and because it would impose content-based restrictions on that speech." App. 44a. Neither of those constitutional problems is applicable to mandatory assessment programs — such as those upheld in *Wileman Bros.* — since those programs neither "require[] [handlers] themselves to speak" (117 S. Ct. at 2139) nor treat handlers differently on the basis of the content of their own speech.

Having concluded that, for different reasons, both mandatory assessment programs and creditable advertising programs implicate the freedom of speech, the court of appeals analyzed the programs under the three-part standard for commercial speech regulations articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). While the court concluded that both types of advertising programs are unconstitutional, its analysis distinguished between the programs in several respects. For example, the court considered it "a more difficult question" whether the "entire assessment-funded almond promotion program" (as distinguished from the creditable advertising provisions) directly advanced the government's interest in promoting almond consumption (App. 51a), and its holding that the program was more extensive than necessary to further the governmental interest was based in large part on its determination that a number of the onerous restrictions on creditable advertising were unjustified (App. 53a).

The court of appeals remanded the case to the district

court for further proceedings on the appropriate remedy. App. 70a-71a. The Secretary did not seek review by this Court of the court of appeal's decision. See U.S. Pet'n for Cert., *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879, at 11 (filed May 1996).

On remand, the district court ordered the government to pay petitioners approximately $4.3 million. App. 34a-37a. The court of appeals affirmed in part and reversed in part. App. 2a-14a. It reversed the order requiring the government to reimburse petitioners for their payments to third parties for creditable advertising on the ground of sovereign immunity. App. 4a-8a. The court of appeals affirmed both the district court's order of a refund to petitioners of monies they paid to the Board or into escrow and the district court's refusal to reduce the amount of the refund to take into account the alleged benefit that petitioners had received from the generic advertising purchased with their assessments. App. 8a-10a.

D. The Intervening *Wileman Bros.* Decisions

In another Ninth Circuit case, decided after the initial decision by the court of appeals in this case but before the panel's second decision on remedies, handlers of California peaches, nectarines, and plums made a First Amendment challenge to the advertising programs established under the AMAA marketing orders for those commodities. These programs were of the mandatory assessment type; they did not involve creditable advertising and thus did not entail any content-based regulation of handlers' own advertising. The Ninth Circuit sustained the challenge, finding the case "largely governed by *Cal-Almond*." *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367, 1377 (1995).

The Solicitor General filed a petition for a writ of certiorari to review the Ninth Circuit's ruling on the First Amendment issue in *Wileman Bros.* U.S. Pet'n for Cert., *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184 (filed Jan. 1996). While that petition was still pending, and

after the Ninth Circuit issued its decision on remedies in this case, he filed a petition for certiorari in this case, asking the Court to hold the petition and dispose of it in light of the Court's disposition of *Wileman Bros.* See U.S. Pet'n for Cert., *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, at 11. The petition in this case did not raise the creditable advertising issue decided by the Ninth Circuit. *Id.* at I (stating the sole question presented as whether the First Amendment proscribes a program "to require the handlers of California almonds to fund a generic advertising program for that commodity").

This Court granted the petition in *Wileman Bros.* and reversed the Ninth Circuit, holding that the mandatory assessment program does not violate handlers' free speech rights. The Court emphasized three points:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

117 S. Ct. at 2138 (footnotes omitted).

The Court then granted the Solicitor General's petition in this case, vacated the Ninth Circuit's decision, and remanded for further consideration in light of the decision in *Wileman Bros.* 117 S. Ct. 2501 (1997).

E. The Proceedings on Remand

Before the court of appeals had received any motions or briefs from the parties addressing the distinctions between the *Wileman Bros.* decision and the instant case, it issued an order, stating in its entirety: "This case is REMANDED to the district court with instructions to dismiss Cal-Almond's First Amendment claim. *See Glickman* v. *Wileman Bros. & Elliot, Inc.*" App. 1a. Petitioners filed a petition for

rehearing and suggestion for rehearing *en banc*, which, after calling for a response from the government, the court of appeals denied. App. 356a.

REASONS FOR GRANTING THE PETITION

Petitioners return to this Court for relief after a brief, and ultimately empty, remand to the Ninth Circuit following this Court's decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). This case presents a constitutional question not raised or addressed by *Wileman Bros.*: whether a federal agricultural marketing order that bases the amount of the assessment that must be paid by handlers of a commodity on the content of each handlers' own brand advertising violates the First Amendment.

In *Wileman Bros.*, this Court held that the Free Speech Clause of the First Amendment is not implicated by a program in which handlers of agricultural commodities are required to pay an assessment to an industry board for the purpose of disseminating generic advertising. Essential to that holding was the Court's conclusion that the marketing orders "impose no restraint on the freedom of any producer to communicate any message to any audience." *Id.* at 2138. While that reasoning may be sufficient to dispose of any challenge to some agricultural marketing orders, it is inapplicable to the creditable advertising provisions in this case, which unmistakably impose a restraint on the freedom of almond handlers to communicate messages of their choice by penalizing some messages and rewarding others, on the basis of their content.

Both the Ninth Circuit in its previous opinion (App. 42a-53a) and the Solicitor General in his certiorari petition in this case (at 13-14) have acknowledged that the creditable advertising provisions raise constitutional issues different from those raised by the mandatory advertising assessments in *Wileman Bros.* Nonetheless, after remand from this Court for reconsideration in light of *Wileman Bros.*, the court of

appeals summarily entered an order directing the district court to dismiss petitioners' First Amendment claim — without briefing, argument, or an opinion. Evidently, the panel that summarily dismissed petitioners' case assumed that creditable advertising programs are constitutionally indistinguishable from compelled advertising assessment programs — and gave petitioners no opportunity to explain why the two types of programs are different.

Petitioners now seek review of the Ninth Circuit's decision on the constitutionality of the creditable advertising program. At a minimum, petitioners request that this Court vacate the decision below and remand the case again to the Ninth Circuit with instructions to give serious consideration to the important constitutional question raised in this case.

1. The First Amendment issue presented here is fundamentally different from the issue resolved in *Wileman Bros.* Indeed, far from supporting the Ninth Circuit's dismissal of petitioners' claims in this case, the reasoning of *Wileman Bros.* confirms that the creditable advertising program at issue in this case violates the First Amendment.[8] The mandatory assessment program upheld in *Wileman Bros.* had no effect on the handlers' own speech. The handlers simply paid into a fund, which was used to advertise equally all products. The program involved no scrutiny of the handlers' own speech; it offered neither incentive for speaking in one way nor disincentive for speaking in another.

By contrast, the creditable advertising program at issue here is a system of rewards and penalties based on the content of the handlers' own speech. If their advertisements pass muster in the eyes of the Almond Board, handlers receive

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[8] The analysis of the four dissenting Justices in *Wileman Bros.* would apply with even greater force to the creditable advertising program. See 117 S. Ct. at 2142 (Souter, J., dissenting); *id.* at 2155 (Thomas, J., dissenting).

almost a dollar-for-dollar credit against their assessment, up to the portion of the assessment designated by the Board for paid advertising — which is the lion's share of the overall assessment, see note 5, *supra*. If their advertisements do not meet with the Board's approval, they have to pay the assessment. The program thus constitutes both a compulsion to speak and a content-based judgment on what they say, backed up by financial rewards and penalties.

In *Wileman Bros.*, the Court held that three characteristics of the mandatory assessment program distinguish it from laws that abridge the freedom of speech:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

117 S. Ct. at 2138 (footnotes omitted). Under the first two of these three criteria, the creditable advertising program violates the freedom of speech. First, the creditable advertising program *does* impose a restraint on the freedom of the producer to communicate the message of his choice to the public: some messages will entitle the producer to a monetary credit and other messages will force the producer to pay the full assessment. See *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 469 (1995) (denial of financial "incentive" for speech "imposes a significant burden on expressive activit[ies]"). In *Wileman Bros.*, the assessment that must be paid was wholly unaffected by the handler's own speech; in this case, the amount the handler must pay is determined largely by the content of his speech. Second, the creditable advertising program *does* compel handlers to engage in actual speech, on penalty of payment of an assessment to the Almond Board. In *Wileman Bros.*, handlers had to pay their full assessment whether they

engaged in their own advertising or not. In this case, the program imposes the functional equivalent of a fine or an additional tax on handlers who do not advertise or do not advertise in the manner dictated by the Secretary and the Blue Diamond-controlled Board.

Moreover, the creditable advertising program involves content-based scrutiny of private speech by a government entity — a feature wholly absent from *Wileman Bros.* Discrimination on the basis of the content of speech is an evil at the core of the First Amendment's protections. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc.* v. *Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641-647 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-382 (1992). To make matters worse, these content-based restrictions are administered by a non-neutral decisionmaker — a Board dominated by one company, Blue Diamond, whose interests are diametrically opposed to those of petitioners. App. 165a; R. 135-139. To vest the power to exercise subjective judgments about the content of private speech in a board dominated by a competitor violates fundamental principles of freedom of speech. Cf. *Air Line Pilots Ass'n* v. *Miller*, No. 97-428, 1998 U.S. LEXIS 3403, at *20 (U.S. May 26, 1998) (noting that *Central Hudson* requires "'an impartial decisionmaker'"); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-136 (1992); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 307 (1986).

The distinctions between this case and *Wileman Bros.* thus go to the heart of First Amendment doctrine.

Both the Ninth Circuit and the Solicitor General have, in the past, acknowledged the differences between the constitutional issues in the two cases. The initial decision of the court of appeals in this case separately analyzed the First

Amendment implications of the mandatory assessment and creditable advertising programs, and based its conclusion that they implicate free speech concerns on different reasoning. See pages 5-7, *supra*. Then, in applying the *Central Hudson* test, the court of appeals identified several respects in which the two types of advertising program differ for constitutional purposes. App. 41a-53a.

Similarly, the Solicitor General acknowledged these differences. In his petition for certiorari in this case, the Solicitor General urged the Court to decide *Wileman Bros.* on the merits and to hold the petition in this case. The petition explained:

> [T]he Ninth Circuit's decision on the First Amendment issue in this case turned in part on certain aspects of the creditable advertising regulation then in effect. In particular, the court determined that the regulation was overly restrictive with respect to the types of advertising for which handlers could receive credit. That determination, in turn, was based in part on the court's views as to certain features of the almond market, such as distribution patterns and end uses for almonds.[9] The court's determination that the creditable advertising regulation was overly restrictive, in light of the manner in which almonds were marketed, affected the court's analysis of the generic advertising program under both the "directly advances" and the "no more extensive than necessary" parts of the *Central Hudson* test.

Pet'n for Cert., at 13-14 (footnotes omitted). See also *id.* at 15 (stating that in this case, unlike in *Wileman Bros.*, the

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[9] This apparently was the Solicitor General's euphemistic reference to the court's finding that the sole logic behind the restrictions was to benefit Blue Diamond, which holds a near monopoly on retail almonds, at the expense of ingredient almond handlers. See App. 51a.

Ninth Circuit "reli[ed] * * * on the former creditable advertising regulation in the marketing order for California almonds and on certain features of the market for California almonds"). Of course, if those features distinguished this case from *Wileman Bros.* when the Secretary was petitioning, then those same factors distinguish this case from *Wileman Bros.* now. With all respect, the Solicitor General should be deemed estopped from arguing now that the cases are indistinguishable. See *Steagald* v. *United States*, 451 U.S. 204, 208-211 (1981).

Once the content-based restrictions on creditable advertising are subjected to scrutiny under the *Central Hudson* test, it is exceedingly improbable that they could be upheld.[10] As the court of appeals discovered in its initial examination of this question, the restrictions have "no logical justification" other than "to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as [petitioners], who sell primarily to ingredient manufacturers." App. 53a. Blue Diamond has a near-monopoly (92% market share) on retail almond sales (App. 51a n.9), as well as control over the Almond Board. As a result of the carefully-crafted content restrictions on creditable advertising, Blue Diamond can advertise its own brand and its own retail stores, and receive full credit against its assessment, while petitioners, who produce ingredient almonds, are denied credit for advertising their own products. On the other hand, when they pay the assessment, it is used to advertise retail almonds, which is Blue Diamond's product. App. 53a. Heads I win, tails you lose.

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[10] This Court did not reach the *Central Hudson* question on its review of the mandatory assessment program in *Wileman Bros.* The Ninth Circuit, however, held that the program did not pass the *Central Hudson* test, and the four dissenting Justices in *Wileman Bros.* would reach the same result. See 117 S. Ct. at 2149-2153 (Souter, J., dissenting); *id.* at 2155 (Thomas, J., dissenting).

This biased program grossly exacerbates the considerable problems with creditable advertising schemes already acknowledged by the government. In his brief in *Wileman Bros.*, the Solicitor General stated that under a creditable advertising program, "individual handlers would have little interest in participating in collective efforts to promote increased overall consumption of a commodity. Instead, there would be a strong incentive for each individual handler to tailor its own advertising to inure to its benefit." U.S. Br., *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184, at 46 (filed July 1996). This analysis was adopted by the Court in *Wileman Bros.*, 117 S. Ct. at 2141:

> the potential benefits of individual advertising do not bear on the question whether generic advertising directly advances the statute's collectivist goals. Independent advertising would be primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity.

In this case, the almond creditable advertising program is designed to benefit only Blue Diamond. And, as the government noted in *Wileman Bros.* (U.S. Br. at 46.), this type of program "jeopardize[s] the government's ability to achieve any of its stated interest" in agricultural marketing orders.

Moreover, the issue is of considerable importance. The AMAA authorizes the Secretary to allow credits for individually purchased advertising by handlers of various agricultural commodities regulated under the Act, including, in addition to almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. 7 U.S.C. § 608c(6)(I). Acting on this statutory authority, the Secretary has adopted several creditable advertising regulations. See, *e.g.*, 7 C.F.R. § 932.45(a)(2) (California olives); § 982.58(b) (filberts and hazelnuts from Oregon and Washington); and § 989.53(b)

(California raisins).[11]

Finally, although the Ninth Circuit's order in this case is unpublished, it will have a broad effect on a number of constitutional challenges to creditable advertising regulations pending in the courts below. Indeed, the government has cited the court of appeals' order on remand from this Court in support of its motions to dismiss pending constitutional challenges to creditable advertising programs.[12] See U.S. Mem., *Cal-Almond, Inc.* v. *U.S. Dep't of Agriculture*, No. CV-F-98-5049, at 1 (E.D. Cal.) (filed May 4, 1998) (relying on and attaching a copy of the Ninth Circuit's order in this case in seeking dismissal of a challenge to "essentially the identical promotion program"); U.S. Mem., *United States* v. *Cal-Almond, Inc.*, No. CV-F-94-5985, at 3-4 and n. 1 (E.D. Cal.) (filed May 4, 1998) (citing the Ninth Circuit's order in this case for the proposition that the "*constitutionality* of the Almond Order promotion and advertising program is well-settled") (emphasis in original). Since the creditable advertising programs happen to involve marketing orders that operate

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[11] Since the initial decision by the Ninth Circuit in this case, the restrictions on creditable advertising by California almond producers have been modified in some respects, see 7 C.F.R. § 981.441 (1998), but the changes did not eliminate the serious constitutional defects identified in this case. Indeed, the new regulations are indistinguishable from a constitutional perspective, and have at least as onerous an effect on petitioners. For example, the regulations severely limit a handler's advertising for products in which almonds are an ingredient. 7 C.F.R. § 981.441(e)(4)(iv) (1998). If, however, this Court were to conclude that the regulatory modifications affect the certworthiness of the case, this would be a reason to remand to the Ninth Circuit; it would not be a reason to allow petitioners' First Amendment claim to be buried without fair consideration.

[12] Copies of the government's briefs in these cases have been lodged with the Clerk of the Court.

within the confines of the Ninth Circuit, there is a serious danger that this important constitutional question will be forever resolved without a full and fair opportunity for the victims of these outrageous programs to present their case.

For these reasons, the Court should grant review to resolve the First Amendment issues raised by the government's statutory authority to impose a creditable advertising program on agricultural commodities.

2. At a minimum, the Court should grant the petition, vacate the Ninth Circuit's dismissal order, and remand the case again for serious consideration in light *Wileman Bros.* Such consideration was contemplated by the Court's first remand order. The court of appeals' failure to engage in such consideration was fundamentally unfair to petitioners, and cannot be squared with this Court's instructions. If this case had arisen after *Wileman Bros.*, petitioners would have had the right to file briefs explaining why they should prevail under the reasoning of that case. In the actual procedural posture of this case, petitioners were, and are, entitled to no less.[13]

It appears that the court of appeals erroneously understood this Court's remand order as a judgment on the merits against petitioners. An order by this Court granting a petition, vacating a judgment, and remanding a case for reconsideration in light of an intervening decision by the Court "does not amount to a final determination on the merits." *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964); see *Lawrence* v. *Chater*, 516 U.S. 163 (1996) (GVR order does not

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[13] Petitioners were able to raise some of their arguments in their petition for rehearing *after the court of appeals had ordered dismissal of the case*, but this can hardly be treated as equivalent to an opportunity to file a brief on the merits. The rehearing petition, of necessity, was devoted to the question why the panel's order should be reheard, rather than to the constitutional issues involved.

represent a ruling on the merits). As noted in R. Stern, E. Gressman, S. Shapiro, and K. Geller, SUPREME COURT PRACTICE 250 (7th ed. 1993), longstanding precedents show that:

> the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order, and that the lower court is being told to reconsider the entire case in light of the intervening precedent which may or may not compel a different result.

Here, the court of appeals summarily disposed of petitioners' substantial First Amendment claim, erroneously treating the remand from this Court as "the functional equivalent of [a] summary reversal." Another GVR order in this case would achieve many of the benefits identified by the Court in explaining this common practice (*Lawrence*, 516 U.S. at 167 (citation omitted)):

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the "potential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Thus, if the Court, contrary to our submission, decides that full plenary review of this case is not appropriate, the Court should nonetheless vacate the decision below and remand the case for full consideration of the merits of petitioners' constitutional claim. This would serve as an important signal to the lower courts that a remand from this Court with instructions to reconsider in light of a recent decision requires genuine reconsideration, and should not be treated as a summary disposition.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should vacate the order below and remand with instructions to receive briefing and argument on the relevance of *Wileman Bros.* to this case.

Respectfully submitted.

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JUNE 1998

Supreme Court, U.S.
FILED

No. 97- 971935 JUN 0 1 1998

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

CAL-ALMOND, INC., CARLSON FARMS, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., AND FRAZIER NUT FARMS, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-17160, 94-17163
94-17164, 94-17166
94-17167, 94-17182

D.C. Nos. CV-91-0064-REC,
CV-91-0122-REC, CV-91-0123-REC
CV-91-0685-REC, CV-92-5684-REC
AND CV-86-0087-REC

CAL-ALMOND, INC., A CALIFORNIA CORPORATION;
SAULSBURY ORCHARD AND ALMOND PROCESSING INC.;
CARLSON FARM, A SOLE PROPRIETORSHIP,
PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF AGRICULTURE,
DEFENDANT-APPELLANT

[Filed: Sept. 4, 1997]

ORDER

Before: CHOY, SCHROEDER, AND BRUNETTI, Circuit Judges.

This case is REMANDED to the district court with instruction to dismiss Cal-Almond's First Amendment claim. *See Glickman v. Wileman Bros. & Elliott, Inc.*, No. 95-1184, 1997 WL 345357 (U.S. June 15, 1997).

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 94-17160, 94-17163, 94-17164, 94-17166,
94-17167 and 94-17182

CAL-ALMOND, INC., A CALIFORNIA CORPORATION;
SAULSBURY ORCHARD AND ALMOND
PROCESSING INC.; CARLSON FARMS, A SOLE
PROPRIETORSHIP, PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF AGRICULTURE,
DEFENDANT-APPELLANT

Argued and Submitted May 11, 1995

Decided Oct. 10, 1995

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

In a previous appeal for these cases, we held that certain provisions of the California Almond Marketing Order (Order), 7 C.F.R. § 981, violated the free speech and free association rights of several almond handlers. *Cal-Almond, Inc. v. Department of Agriculture*, 14 F.3d 429 (9th Cir.1993) (*Cal-Almond I*). We remanded the case to the district court to conduct the fact-intensive inquiry necessary to determine the appropriate remedy. On remand, the district court ordered the United States Department of Agriculture (USDA) to refund the full amount the almond handlers had paid to the Board since 1980, to release all of the advertising assessments that had been placed in escrow accounts, and to reimburse the almond handlers all of the money they spent on creditable advertising. The USDA appeals the propriety of the

district court's award. We have jurisdiction, *see* 28 U.S.C. § 1291, and we affirm in part and reverse in part.

I.

In our previous opinion, we held that certain provisions of the Order, which was issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601-674 (AMAA), to regulate the California almond-handling industry, violated the almond handlers' free speech and free association rights. *Id.* at 440. Specifically, we examined the Order's provisions that required almond handlers to contribute to a generic pro-almond public relations, advertising, and promotion program (Program). The Program, administered by the California Almond Board (Board), was funded by assessments collected from almond handlers on the basis of the volume of almonds handled. 7 C.F.R. §§ 981.41(a), 981.81(a). The assessments could be reduced, at least in part, by the amount a handler spent on creditable advertising and other promotional activities as provided in 7 C.F.R. § 981.441(d)(1)(i)-(iii). In order to be approved by the Board, the promotional activity had to have as its "clear and evident purpose" the promotion of "the sale, consumption, or use of California almonds." 7 C.F.R. § 981.441(e)(2).

In *Cal-Almond I*, we held that the Board's assessments implicated the almond handlers' First Amendment rights because the handlers, who constitute a "publicly identified group," were forced to fund the "'dissemination of a particular message associated with that group.'" *Cal-Almond I*, 14 F.3d at 435 (quoting *United States v. Frame*, 885 F.2d 1119, 1132 (3rd Cir.1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990)). We found that the assessments implicated the handlers' rights to free speech and free association, regardless of whether the assessments were paid directly to the Board or satisfied by expenditures on creditable advertising and promotional activities. *Id.* Applying the three prong test from *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we concluded that the Almond Marketing Program violated the handlers' First Amendment rights. *Cal-Almond I*, 14 F.3d at 440. Consequently,

we remanded to the district court the fact-intensive determination of the appropriate remedy. *Id.* at 449.

On remand, the parties stipulated regarding the various amounts that each handler paid to the Board for creditable advertising, that had been placed in escrow for payment of creditable advertising assessments, that had been paid to third parties (*i.e.*, newspapers, magazines, etc.) for creditable advertising, and the portion of each handler's annual assessments that was applied toward the Board's generic promotional activities. The district court ordered the USDA to refund approximately $135,000, which represents the full amount handlers paid to the Board since 1980, to release approximately $1.7 million of advertising assessments that had been placed in escrow accounts, and to reimburse the $2.5 million that they had paid third parties for creditable advertising. The USDA timely appeals this order.

II.

We first address whether the doctrine of sovereign immunity bars the reimbursement of money the handlers spent on creditable advertising ordered by the district court.[1] We review questions involving principles of sovereign immunity de novo. *United States v. Woodley,* 9 F.3d 774, 781 (9th Cir.1993).

It is well established that "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity. . . ." *United States v. Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976). It is also clear that waivers of sovereign immunity must be "unequivocally expressed." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 112 S.Ct. 1011, 1014, 117 L.Ed.2d 181 (1992). Claims for specific relief, however, are not subject to sovereign immunity. *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983). The question we must decide, therefore, is whether reimbursement of the money that the handlers paid for

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[1] The USDA does not, and indeed could not, contend that refund of assessments paid to the Board would be damages and therefore barred by sovereign immunity. *See Wileman Bros. & Elliott, Inc. v. Espy,* 58 F.3d 1367, 1386 (9th Cir.1995).

creditable advertising is best characterized as damages, and thus barred by the doctrine of sovereign immunity, or as specific relief.

The distinction between money damages and specific monetary relief is that "[d]amages are given to the plaintiff to *substitute* for a suffered loss. . . . specific remedies 'are not *substitute* remedies at all, but attempt to give the plaintiff the very thing to which he is entitled.'" *Maryland Dept of Human Resources v. Department of HHS,* 763 F.2d 1441, 1446 (D.C.Cir.1985) (quoting D. Dobbs, Handbook on the Law of Remedies 135 (1973)); *see also Bowen v. Massachusetts,* 487 U.S. 879, 914, 108 S.Ct. 2722, 2742, 101 L.Ed.2d 749 (Scalia, J., dissenting) ("Whereas damages compensate a plaintiff for a loss, specific relief prevents or undoes the loss-for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken. . . .").

Requiring the USDA to reimburse the handlers for money they expended on creditable advertising would oblige the USDA to "substitute" money from its coffers for money the handlers had paid to third parties. Unlike the assessments paid directly to the Board, in the situation of the money paid for creditable advertising, the USDA cannot return the "precise property wrongfully taken" because that money was not paid to the USDA. Reimbursement for the money handlers spent on creditable advertising would therefore constitute damages. Since nothing in the Act demonstrates congressional intent to waive sovereign immunity for the claims raised by the handlers, *see Wileman,* 58 F.3d at 1385, the handlers' claims for reimbursement for money spent on creditable advertising are barred by sovereign immunity.

The handlers cite several cases in which monetary remediation was not barred by sovereign immunity, arguing that those cases compel the conclusion that reimbursement in this case would not constitute damages. *See, e.g., Bowen v. Massachusetts,* 487 U.S. 879, 910, 108 S.Ct. 2722, 2740, 101 L.Ed.2d 749 (1988); *Katz v. Cisneros,* 16 F.3d 1204, 1208 (Fed. Cir. 1994); *Alaska Airlines, Inc. v. Johnson,* 8 F.3d 791, 797 (Fed. Cir. 1993); *Zellous v. Broadhead Assoc.,* 906 F.2d 94 (3d Cir. 1990). In those cases, however, the monetary awards were made to plaintiffs because they were statutorily entitled to amounts that had been wrongfully withheld, not to reimburse them for money spent. For example, in

Zellous — the case primarily relied upon by the handlers and the district court — plaintiffs were tenants of a housing project whose rent was subsidized under federal law. *Zellous*, 906 F.2d at 95. The tenants claimed that the Department of Housing and Urban Development (HUD), together with the housing project's owners and managers, violated the Housing Act and associated federal regulations as well as the Administrative Procedure Act (APA) by failing to make timely adjustments in their utilities allowance. *Id.* As a consequence of these violations, the tenants did not receive from HUD money to which they were entitled under the Housing Act and they paid more in rent than they should have. *Id.*

At first glance, *Zellous* and the other cases on which the handlers rely, appear to resemble the situation in this case. Like this case, plaintiffs in *Zellous* paid money to third parties (*i.e.*, private landlords). However, the plaintiffs in *Zellous* were not compensated for the money they were wrongfully forced to pay in excess rent. Instead, the court in *Zellous* "'merely require[d] [HUD] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it [implemented timely utility allowance adjustments.]'" *Id.* at 99 (second and third alterations in original) (internal quotation marks omitted).

It is true the amount the *Zellous* plaintiffs paid to the landlords was equal to the amount wrongfully withheld, but that fact does not blur the distinction between the different theories of recovery. Had the plaintiffs in *Zellous* framed their request for relief as seeking recovery of money wrongfully paid, their recovery would have been barred by sovereign immunity. They avoided this problem by instead framing their claim as one seeking to have the government pay them money to which they were statutorily entitled. The coincidence that the two amounts (the amount of excess rent paid and the amount owed to plaintiffs by HUD) were the same does not change the fact that the *Zellous* plaintiffs had a separate remedial theory that did not seek compensation for money they paid in excess rent. The availability of an alternative remedial theory allowed them to avoid the roadblock that sovereign immunity otherwise would have presented. By contrast, no alternative theory exists in this case to entitle the handlers to recover moneys spent on creditable advertising.

The almond handlers also argue that the doctrine of the law of the case precludes us from addressing the appropriateness of the district court's order requiring reimbursement of money spent on creditable advertising. The law of the case doctrine requires that a decision rendered by an appellate court on a legal issue be followed in all subsequent proceedings in the same case. *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir.1985), *cert. denied*, 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 601 (1986). The almond handlers urge that we implicitly contemplated the reimbursement of the $2.5 million spent on creditable advertising in our decision in *Cal-Almond I*, and are therefore precluded from reconsidering it. To buttress their argument, the almond handlers point out that in *Cal-Almond I*, we found that the Order was unconstitutional regardless of whether the handlers made direct payment to the Board or expended money on pre-approved advertising. This argument confuses the distinction between right and remedy.

In *Cal-Almond I*, we defined the First Amendment rights infringed by the Program. For the purpose of that analysis, it did not matter to whom the money was paid; it only mattered that the payments were coercive and required the handlers to fund dissemination of a particular message. However, when analyzing what remedies are available, it matters a great deal whether the recovery would require the USDA to reimburse the handlers for money they paid to third parties because of the doctrine of sovereign immunity.

Our analysis regarding sovereign immunity leads us to a somewhat awkward result: although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations. Despite the celebrated dictum in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), in the law of modern constitutional remedies, not every right comes equipped with a guarantee of individual remediation for every violation of that right. As this case demonstrates, the doctrine of sovereign immunity provides a formidable limitation on the availability of individual remedies. While it is "[d]ecried as irrational and immoral by some, . . . criticized on historic grounds by others, . . . recognized by all to have little doctrinal coherence, the doctrine of sovereign immunity nonetheless retained the

endorsement of the two institutions that matter-the Supreme Court and Congress." *Interfirst Bank of Dallas, N.A. v. United States,* 769 F.2d 299, 303 (5th Cir.1985), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458, 89 L.Ed.2d 716 (1986). Under the doctrine of sovereign immunity, we are compelled to conclude that the handlers' claims for reimbursement of the amounts they were wrongfully compelled to pay for creditable advertising is a right for which there is no individual remedy.

III.

We now turn to the USDA's argument that any refund to the almond handlers must be offset or reduced by the amount of benefit the handlers received from the Board's activities.

As a primary matter, the almond handlers assert that the USDA either waived, or should be estopped from asserting, its claim for offset of the refund. The almond handlers argue that the USDA waived its argument regarding offset because it did not raise the issue until we remanded the case for determination of the remedies. However, it was not until our remand that the specifics of fashioning remedial relief came into focus. The USDA did not waive its opportunity to raise the issue of offset by letting the determination of remedies occur without it. For this reason, the cases relied on by the handlers are distinguishable. In both *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089 (D.C.Cir.1984), *cert. denied,* 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985), and *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250-51 (D.C.Cir.1987), defendants failed to raise objections to courts' remedial determinations at the time those determinations were being made. In this case, the USDA did not waive its opportunity to raise the issue of offset.

Nor is it precluded by the doctrine of judicial estoppel. Judicial estoppel "'is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.'" *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir.1989) (quoting *Religious Technology Ctr. v. Scott*, 869 F.2d 1306, 1311 (9th Cir.1989) (Hall, J., dissenting)), *cert. denied*, 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991).

The almond handlers contend that the USDA previously conceded that the handlers would be entitled to receive a full refund if the assessments were found to have been wrongfully imposed. In support, the handlers refer us to the USDA brief for *Cal-Almond I*, in which the USDA stated, "[T]he AMAA, through its provisions for judicial review, provides handlers with an opportunity to recoup assessments found to have been wrongfully imposed." The almond handlers also cite the USDA's cross-motion for summary judgment in the original proceeding before the district court, in which the USDA stated, "The AMAA . . . provides handlers with an opportunity to recoup assessments found to have been wrongfully imposed." The handlers overstate the USDA's concessions. These statements merely indicate that the USDA acknowledges that a refund is available for wrongfully imposed assessments, not an admission that the handlers are entitled to a full refund. The USDA cannot be judicially estopped from arguing against a full refund.

The handlers' primary contention is that the law of the case precludes us from reviewing the question of whether the handlers' refund from the Board should be reduced. Whether an appellate court previously decided an issue of law, precluding the district court from reconsidering the same issue, is a mixed question of fact and law in which legal questions predominate. *Cf. United States v. Geophysical Corp.*, 732 F.2d 693, 697 (9th Cir. 1984). A mixed question of law and fact in which legal issues predominate is reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. (en banc)), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

The USDA contends that the law of the case doctrine does not preclude consideration of this issue because *Cal-Almond I* acknowledged that plaintiffs received some benefit from the unconstitutionally compelled advertising. Our prior acknowledgment that the handlers received some benefit from the coerced advertising, the USDA contends, implies that we did not intend for the handlers to be refunded all of the money they paid to the Board. This time it is the USDA who confuses right and remedy.

In applying the *Central Hudson* balancing test to determine whether the almond handlers' First Amendment right was violated, we weighed the benefit handlers derived from the coercive advertising. *Cal-Almond I*, 14 F.3d at 437-38. Once we applied the balancing test and determined that the assessments failed the balancing, however, we concluded that the *entire* amount of assessments spent in advertising were unconstitutional, not merely the portion that failed to advance the handlers' efforts to sell their almonds. *Id.* at 438. In other words, our consideration of the benefit to the handlers was for the purposes of analyzing the right, not the remedy.

In *Cal-Almond I*, we decided that "a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due." *Id.* at 448. Our decision was simply an application of existing law. "[T]his court, on several occasions, has suggested that a refund of improper assessments is the appropriate remedy for prevailing handlers." *Wileman*, 58 F.3d at 1385 (citing *Cal-Almond I*, 14 F.3d at 448; *Riverbend Farms*, 847 F.2d at 559; *Navel Orange Admin. Comm.*, 722 F.2d at 452).

Despite the well established law in this area, and our reliance on it in *Cal-Almond I*, the USDA attempts to have us consider the benefit to the handlers with respect to remedies by proffering a very novel argument. The USDA contends that unless we discount the handlers' refund by the amount by which they benefited by the Board's unconstitutional conduct, they will be unjustly enriched. However, the USDA cannot point to, nor can we find, any case in which the theory of unjust enrichment has been relied upon in fashioning a constitutional remedy. The fact that the assessments may have conferred some benefit on the handlers does not change the fact that the entire amount of the assessments used for advertising was improper and, as we held in *Cal-Almond I*, that the handlers are entitled to refund of any improper assessments.

IV.

The USDA's final argument is that the district court erred by refusing to remand to the Secretary for creation of a supplemental administrative record. The USDA asserts that a remand is required

by the AMAA, or in the alternative, by the doctrine of primary jurisdiction.

We review the district court's interpretation of the AMAA de novo. *See cf. [sic] Abedini v. INS*, 971 F.2d 188, 190-91 (9th Cir.1992) (reviewing de novo the determination of purely legal questions regarding statutory requirements).

"Congress has provided a special procedure for ascertaining whether [a marketing] order is or is not in accordance with the law." *United States v. Ruzicka*, 329 U.S. 287, 294, 67 S.Ct. 207, 210, 91 L.Ed. 290 (1946). The AMAA gives handlers of agricultural commodities the express right to seek administrative review of "any [marketing] order or a provision of such order or any obligation imposed in connection therewith." 7 U.S.C. § 608c(15)(A). A handler contending that such a provision is "not in accordance with law" is entitled to a hearing on that question before the agency and a ruling by the Secretary, *id.*, and the remedy must be sought from the Secretary in the first instance. *Ruzicka*, 329 U.S. at 294, 67 S.Ct. at 210. The Secretary's final ruling is then reviewable by a district court. 7 U.S.C. § 608c(15)(B). "If the court determines that [a] ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." *Id.*

This scheme has been complied with in this case. The handlers filed administrative petitions pursuant to 7 U.S.C. § 608c(15)(A). *Cal-Almond I*, 14 F.3d at 434. Following hearings, USDA administrative law judges issued decisions, which were appealed to USDA Judicial Officers. After the Judicial Officers rendered their decisions, the handlers brought their claims to the district court. This is all the Act requires.

The USDA nevertheless contends that the district court erred by refusing to remand to the Secretary for creation of a supplemental administrative record. There is no reason to remand to the USDA for determination of the scope of the remedy. To the contrary, we have held on numerous occasions, including the prior appeal in this case, that an appropriate remedy for handlers who

prevail in their administrative petitions is a refund of assessments wrongfully paid. *See Cal-Almond I*, 14 F.3d at 448; *United States v. Riverbend Farms*, 847 F.2d 553, 559 (9th Cir.1988) ("If the Secretary or courts (upon proper appeal) substantiated the challenge, the handler would be entitled to a refund."). The parties here stipulated regarding all relevant amounts. Since a determination of the remedy flows directly from our decision in *Cal-Almond I* and the parties' stipulation, there is no need to remand to the Secretary. The district court did not err by declining to remand the issue of remedies to the Secretary.

In the alternative, the USDA argues that the doctrine of primary jurisdiction requires a remand. The doctrine of primary jurisdiction allows courts to exercise their discretion to route certain issues for a threshold decision to the supervising agency of a particular industry. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir.1987). Four common factors are considered when determining whether to invoke the doctrine of primary jurisdiction: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." *Id.* at 1362.

It is true that "Congress channeled disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984). However, the remedies in this case do not involve "technical questions of fact uniquely within the expertise and experience of [the USDA]...." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643 (1976), *superseded by statute (on another ground) as stated in, Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926, 111 S.Ct. 307, 112 L.Ed.2d 261 (1990). Nor do they require complicated calculations that require the expertise of the Secretary. We therefore find that the district court did not abuse its discretion by declining to invoke the doctrine of primary jurisdiction.

V.

Before closing, we note that a wide cross-section of the almond industry, including other handlers not directly involved in this appeal ("Amici"), filed an amicus brief requesting that we not only determine the scope of the remedies to which the handlers are entitled, but also the means by which the USDA should satisfy the judgment. Amici argue that the appropriate source from which the judgment against the USDA should be satisfied is the Judgment Fund, pursuant to 28 U.S.C. § 2414. Amici contend that if the judgment is satisfied either by imposing a supplemental assessment on the industry or by taking money from the reserve fund created pursuant to 7 C.F.R. § 981.81(c), their First and Fifth Amendment rights would be violated. None of Amici's constitutional claims are ripe and we therefore do not consider them.

Although we have held that remand to the Secretary is unnecessary for determination of the scope of the remedy, it is the province of the USDA to determine how a judgment against it should be satisfied. Certainly if Amici believe that the USDA has chosen an unconstitutional method, Amici can challenge this action before the USDA.

VI.

The handlers request an award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Attorney's fees are not appropriate in this case because, even though it did not prevail on all of its claims, the USDA brought a justified appeal from the district court's decision. We also find that the handlers are not entitled to post-judgment interest pursuant to 28 U.S.C. § 1961.

VII.

The district court's decision that the USDA refund the full amount the almond handlers had paid to the Board since 1980 is affirmed. There is no offset for the Board's claim of unjust enrichment. The almond handlers have a right to reimbursement for payment to third parties for creditable advertising, but there is no individual remedy for these violations. Therefore, the district court's decision that the USDA reimburse the $2.5 million that had been paid to third parties for creditable advertising is reversed. We

affirm the district court's refusal to remand the issue of remedies to the Secretary for supplemental administrative record, or failure to invoke the doctrine of primary jurisdiction.

AFFIRMED in part, REVERSED in part.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-91-122 REC

CAL-ALMOND, INC., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

DEFENDANT

[Filed: Sept. 6, 1994]

ORDER RE PLAINTIFF'S POST-REMAND MOTION FOR REFUND AND DEFENDANT'S MOTION FOR REMAND

On July 18, 1994 the court heard plaintiffs' respective Post-Remand Motions for Refund of Almond Board Assessments and defendant's respective Motions for Remand.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its orders with respect to these motions as and for the reasons set forth herein.

A. Background

The Ninth Circuit, in *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429, 433-440 (9th Cir. 1993), held that the Almond Marketing Program described in the pertinent provisions of the Almond Marketing Order violated the First Amendment, thereby reversing this court's decision in factor of the U.S.D.A. on this issue. However, the Ninth Circuit affirmed this court's rulings rejecting other challenges made by plaintiffs to the Almond Marketing Order and its implementation. *Id.* at 440-449. The Ninth Circuit then concluded:

> We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the

> assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ('EAJA'), 28 U.S.C. § 2412. Because of the fact-intensive nature of the inquiry, we find that '[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court.' *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 . . . (1986). *See also Ellis v. Brotherhood of Ry. Clerks,* 466 U.S. 435 ... (1984). The case is remanded for further proceedings consistent with this opinion.

Id. at 449.

B. Refund of Assessments

Plaintiffs now move the court to refund to plaintiffs the creditable advertising assessment imposed on each of the respective plaintiffs for the years at issue with respect to each plaintiff and to refund to plaintiffs that percentage of the annual assessment for the years at issue attributable to the advertising and promotion budget for that year. In addition, plaintiffs seek interest on the refunded amounts at the rate of 5% per annum. Plaintiffs essentially take the position that resolution of the remand is a simple matter of accounting. * * * The Department argues that certain components of the recovery sought by plaintiffs are barred by the doctrine of sovereign immunity, that others should be determined in the first instance by administrative proceedings, and/or that the court must conduct an evidentiary hearing to determine the total amount of any refund to be paid to plaintiffs.

A. Sovereign Immunity.

1. Creditable Advertising Amounts.

A portion of the monies that plaintiffs now seek to have refunded to them by the Department are amounts that plaintiffs spent on advertising through the creditable advertising provisions (as opposed to amounts turned over to the Almond Marketing

Board as assessments a portion of which was spend [*sic*] by the Almond Marketing Board on advertising).[1]

Although recognizing that a return of assessments does not necessarily implicate sovereign immunity, the Department argues that a request to be compensated for sums previously spent but not remitted to the government constitutes a request for money damages which is barred by sovereign immunity. In so arguing, the Department cites *Bowen v. Massachusetts*, 487 U.S. 895 (1988).

In *Bowen*, the United States Supreme Court construed Section 702 of the Administrative Procedure Act as not foreclosing judicial review of an action brought by a state challenging a disallowance order under the Medicaid provisions. In so ruling, the Supreme Court stated in pertinent part as follows:

> Our cases have long recognized the distinction between an action at law for damages — which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation — and an equitable action for specific relief — which may include an order providing for the reinstatement of an employee with back pay, or for 'the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.' . . . The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'

487 U.S. at 893.

Bowen cited with approval its decision in *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985). In *Burlington*, the Supreme Court held that relief that ordered a town to reimburse parents for educational costs that

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[1] The Almond Marketing Order provided that handlers' assessments collected from handlers based on the volume of almonds they handle could be reduced by the amount that a handler spends on authorized advertising. Before a handler could receive credit for his marketing promotion expenditures, the California Almond Board must have determined that such expenditures meet the requirements of the creditable advertising regulations.

Congress intended the town to pay is not "damages", stating in pertinent part as follows:

> In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.

Burlington, 471 U.S. at 370-371.

In addition, *Bowen* cited *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.D.C. 1985), wherein it was stated in pertinent part as follows:

> We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' . . . Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.'. . .

The Ninth Circuit has suggested that the remedy to a handler who successfully challenges a marketing order or its implementation is the "refund of any paid assessments found not to have been due . . . . " *See Saulsbury Orchards & Almond Processing v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); *United States v. Riverbend Farms*, Inc., 847 F.2d 553, 559 (9th Cir. 1988); *Naval Orange Admin. Committee v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983).[2]

The Department argues, however, that this suggestion cannot be applied here because, for those years in which the plaintiffs spent amounts equivalent to what their creditable advertising assessments would have been, those portions of the assessments

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[2] These cases do not hold that this is the exclusive remedy. The cases were rejecting various arguments attempting to get around the application of *United States v. Ruzicka*, 329 U.S. 287 (1946).

never in fact became due and were never actually tendered to the Board.

Plaintiffs argue that the Department's position ignores the conclusion by the Ninth Circuit that the creditable advertising regulations violated the First Amendment because, among other things, "if handlers do not advertise according to the regulations, they must contribute their assessment to the Board, which is itself a type of compulsion implicating Appellants' First Amendment rights." 14 F.3d at 435-436. Plaintiffs further assert that the Department's argument that amounts spent pursuant to the creditable advertising regulations never became due begs the question. Because the assessments became obligations of the handlers when announced by the Secretary each crop year, the Almond Marketing Order and its regulations forced the plaintiffs into a choice of either paying that portion of the assessment attributable to advertising to the Board or to spend some portion of assessment on advertising which had to be approved by the Board in order to obtain a credit toward the annual assessment.

In this regard, plaintiffs refer the court to *Zellous v. Broadhead Associates,* 906 F.2d 94 (3d Cir. 1990). In *Zellous*, the plaintiffs were former, present and prospective tenants of a housing project whose rent was subsidized under federal law. * * * The tenants contended that HUD, together with the housing project's owners and managers, violated the Housing Act and associated federal regulations as well as the APA by failing to make timely adjustments in their utilities allowance. This caused the tenants to pay a higher share of their income as rent than was permitted under the Brooke Amendment, which places a cap on the total of rent plus utilities for which tenants are responsible. In their complaint, the tenants requested "declaratory, injunctive and monetary relief or in the alternative restitution." The tenants contended that the retrospective aspect of this relief should require HUD reimbursement for the rent they paid beyond that which would have been due if the utilities allowance had been set higher. The Third Circuit rejected the claim that this requested relief constituted a request for money damages. In so doing, the Third Circuit stated in pertinent part as follows:

> We recognize that in *Bowen,* the plaintiff state sought specific relief under a statute that maintains direct payment to the state of a percentage of its Medicaid expenses ... Here, neither section 8 nor the Brooke Amendment mandates direct payments to the plaintiff tenants. Instead, the tenants rental obligations is reduced through a system of government subsidies to property owners. We do not believe that this scheme of indirect support for tenants transforms the character of the requested reimbursement as damages.

It appears that *Zellous*, although not exactly on point, does support the plaintiffs' position that what they seek are not money damages, but reimbursement for monies wrongfully expended pursuant to a government program. However, although it may be semantics, there may be a difference between the term refund and the term reimbursement. The fact that the monies at issue were not actually paid to the Board but were actually spent by plaintiffs implies that the concept at issue is one of reimbursement. In this regard, although plaintiffs focus on the term "due" when speaking of refunded assessments, it must be noted that the Ninth Circuit cases upon which plaintiffs rely actually use the phrase "refund of any *paid* assessments found not to have been due . . ."

The court finds this to be a difficult question to resolve. Upon reflection, however, the court concludes that the refund or reimbursement of the creditable advertising amounts is not barred by sovereign immunity on the ground that the amounts represent money damages. The court is persuaded that the refund or reimbursement of these amounts is part of an equitable remedy designed to give to these plaintiffs what the Ninth Circuit has held they were entitled to because of the violation of the First Amendment. As noted by plaintiffs, they would not have spent this money were it not for the fact that both aspects of the advertising provisions of the Almond Marketing Order were unconstitutional.

2. Prejudgment Interest.

Plaintiffs assert that the court should award them prejudgment interest at the rate of 5% on those assessments to be refunded to plaintiffs which have not already been placed by plaintiffs in escrow accounts.

However, an award of interest against the United States is barred by the doctrine of sovereign immunity. As reiterated in *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986):

> In cases not in the Court of Claims, this Court has reaffirmed the notion: 'Apart from constitutional requirements, in the absence of specific provision by statute, or "express consent ... by Congress," interest does not run on a claim against the United States.'

The Supreme Court further explains the qualification of "constitutional requirements":

> The 'constitutional requirement' arises in a taking under the Fifth Amendment. To satisfy the constitutional mandate, 'just compensation' includes a payment for interest ... The no-interest rule is similarly inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise . . . .

Id. at 317 n.5.

Plaintiffs argue that this doctrine does not apply in cases involving First Amendment violations. However, plaintiffs cite no cases in support of this contention and the court could [*sic*] locate any in its research. The cases upon which plaintiffs rely in asserting that they are entitled to prejudgment interest in cases involving deductions from dues in violation of the First Amendment are cases involving non-governmental defendants. *See Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993)[3] Although in remanding this action to this court for further proceedings, the Ninth Circuit cited *Ellis*, it did so by a "*see* also" citation with no particular page reference. The Ninth Circuit also cited *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986). However, there is no suggestion in this citation that the court was to award prejudgment interest. Rather, the citation was

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[3] In *Ellis*, the Supreme Court held that, to avoid forced subsidies forbidden by the First Amendment, unions must adopt procedures 'such as advance reduction of dues and/or interest-bearing escrow accounts.' 466 U.S. at 448.

to clarify that the determination of the appropriate remedy should be made in this court first because of the factual nature of the relevant inquiries.

Therefore, the court rules that plaintiffs are not entitled to prejudgment interest because of the doctrine of sovereign immunity.

B. Supplemental Fact Finding.[4]

The Department takes issue with plaintiffs' contentions that no further fact finding is permitted by the Ninth Circuit's opinion and the remand order. The Department argues that the determination of the appropriate remedy in this case will require an examination of several equitable considerations and important issues concerning the operation of the Order under the AMAA, many of which cannot be evaluated based on the present administrative record.

1. Motion to Remand.

If it is concluded that supplemental fact finding is required in order to determine the appropriate remedy, the Department argues that the court should remand this matter to the Department "to craft such a remedy consistent with the future operation of the Order under the AMAA, based on a supplemental factual record created in an administrative proceeding and subject to judicial review of the award-determination by the Secretary."

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[4] Plaintiffs repeatedly argue that the Department conceded in pleadings filed in the Ninth Circuit that plaintiffs would be entitled to a full refund of the advertising assessments should plaintiffs prevail on the First Amendment issue. The court concludes that plaintiffs are reading more into these briefs than was intended by the Department. Moreover, the court questions that a statement made in the course of briefing an issue which did not address the specifics of fashioning a remedy can be deemed to be a concession. Finally, the portion of the Department's brief set forth as Exhibit K to plaintiffs' reply brief merely quotes the Department's response to plaintiffs' appeal of this court's ruling that plaintiffs' due process rights were not violated by the length of the administrative and review proceedings. The Department merely was referring to the Ninth Circuit law rejected [*sic*] such challenges because of the provisions of the AMAA providing handlers with an opportunity to recoup assessments found to have been wrongfully imposed.

a. AMAA.

The Department argues that such a remand is required by the statutory scheme of the AMAA and *United States v. Ruzicka*, 329 U.S. 287 (1946). Any challenge to the applicability of a marketing order must be made in the first instance administratively pursuant to section 8(c)(15) of the AMAA, 7 U.S.C. § 608(c)(15). *Ruzicka, id.* at 294; *Pescosolido v. Block*, 765 F.2d 827, 831 (9th Cir. 1985). The Department argues:

> Here, any determination of the amount of any award requires specialized knowledge of the industry and the effect of various types of advertising. Perhaps even more importantly, any decision as to how to fashion a remedy, given the bar of sovereign immunity for damages, will entail an assessment of how best to effectuate the purposes of the AMAA while complying with the Ninth Circuit's mandate. The requirement that judicial review of legal issues pertaining to the marketing order be limited to an administrative record should apply to situations such as this one where a new set of facts must be established and reviewed in order to determine the appropriate remedy for a successful legal challenge to a marketing order.

Section 608c(15)(B) does provide in pertinent part that "[i]f the court determines that such a ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." However, the court does not read this provision to *require* that this court remand this matter to the Department for further administrative proceedings. Plaintiffs have already complied with the AMAA in bringing their challenges to the Almond Marketing Order. Plaintiffs have prevailed on the merits of two of their challenges. The Department cites no cases even suggesting that the AMAA requires that the remedy for a determined violation of law with respect to a marketing order must also be determined in the first instance by the Department. Absent specific case authority, this portion of the Department's motion to remand should be denied.

b. Primary Jurisdiction.

As an alternate basis for remanding this action to the Department to determine an appropriate remedy, the Department invokes the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction is explained in *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987):

> The doctrine of primary jurisdiction operates as follows: 'When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved.' . . . The doctrine applies when 'protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'
>
> . . . Thus, it is the extent to which congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine . . . .
>
> There are four factors uniformly present in cases where the doctrine properly is invoked: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.

The Department asserts that each of these factors is satisfied here and that the court should remand.

Plaintiffs respond that the invocation of the primary jurisdiction doctrine is not appropriate or necessary to the resolution of the issues presently before this court.

The court is not persuaded that remand to the Department as an exercise of primary jurisdiction is necessary. It seems to the court that, assuming the amounts to be refunded or reimbursed to plaintiffs can be determined from the record already before the

court, *see* discussion *infra,* the mechanics of making payment(s), although perhaps requiring some evidence from the Board, do not require any particular expertise of the Department.

2. Ability to Conduct Supplemental Fact Finding.

The parties dispute whether this court is permitted to conduct any supplemental fact finding by the terms of the Ninth Circuit's remand. Plaintiffs take the position that the Ninth Circuit has already held that plaintiffs did not receive any benefit from the creditable advertising and the generic promotion programs.

The Department argues that not only did the Ninth Circuit's decision not preclude supplemental factual findings about the extent of the benefits enjoyed by the plaintiffs, but it expressly contemplated further factual findings. The Department takes the position that supplemental fact finding is required to determine the following issues:

> (1) the extent to which plaintiffs benefitted from the creditable advertising program;
>
> (2) the extent to which plaintiffs benefitted from the generic promotion program;
>
> (3) the extent to which plaintiffs' administrative assessments were applied to the Almond Board's generic promotion efforts; and
>
> (4) the extent to which plaintiffs have already "passed through" the costs imposed on them by the advertising assessments.

Plaintiffs take the position that the Ninth Circuit did fashion a remedy and left the mechanical mathematical calculation to the District Court, i.e., all advertising assessments, whether creditable or the administrative portion that the Board assessed for its generic program must be refunded because the Plaintiffs' remedy is a refund of all assessments 'found not to have been due'.

Although the court believes that plaintiffs are quoting the Ninth Circuit's opinion out of context in an effort to imply that the Circuit actually held as argued by plaintiffs, *see Cal-Almond, Inc., supra*, 14 F.3d at 448-449, plaintiffs' assertion that the only reason

that the Ninth Circuit's remand order referred to "fact-intensive nature of the inquiry" is because plaintiffs had requested of a refund of the entire amount of the assessments at issue is a valid comment. Plaintiffs contend that the Ninth Circuit's citations to *Chicago Teachers Union v. Hudson* and *Ellis v. Ry. Clerks* establishes that the Ninth Circuit rejected that assertion and concluded that plaintiffs were entitled only to a refund of that portion of the assessments at issue attributable to the unconstitutional advertising programs, a fact-intensive inquiry.

The court is persuaded that plaintiffs' interpretation of the reason that the Ninth Circuit referred to the two Supreme Court cases is a fair one. In both of these cases, but in particular *Ellis*, there was a combination of union dues imposed for legal and illegal reasons. In *Ellis,* the Supreme Court remanded for a recalculation of damages. In holding that the union would bear the burden of proving by a preponderance of the evidence what proportion of union expenditures went to activities that could be charged to dissenters, the Supreme Court noted that absolute precision in the calculation of such proportion is not expected or required because of the difficult accounting problems that may arise. *Ellis*, 466 U.S. at 457 n.15.

In disputing whether the Ninth Circuit's opinion forecloses or allows supplemental fact finding as argued by the Department, both parties refer the court to the concept of the "law of the case." The law of the case is explained in *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985):

> The law of the case doctrine states that the decision of an appellate court on a legal issue 'must be followed in all subsequent proceedings in the same case.' ... The law of the case controls unless the first decision is clearly erroneous and would result in manifest injustice, there has been an intervening change in the law, or the evidence on remand is substantially different ....
>
> . . .
>
> On remand, the trial court should only ... consider ' "matters left open by the mandate of [the appellate] court."' . . . .

The court concludes that its ability to conduct further supplemental fact-finding pursuant to the Ninth Circuit's remand is extremely limited. In the context of this action, the court concludes that the court may conduct supplemental fact-finding only with respect to the application of the assessments to the generic program. *See* discussion *infra*.

3. Benefit from Creditable Advertising Program.

The Department argues that the only issue foreclosed by the Ninth Circuit's decision is whether the benefit derived by plaintiffs from the two advertising programs was greater than the benefit plaintiffs could have secured if they had been free to spend that same money in any manner they chose. However, the Department contends, the Ninth Circuit's opinion does not address whether there was some benefit realized by the plaintiffs that should properly be considered in making an equitable award determination.

However, the court agrees with plaintiffs that the supplemental fact finding sought to [*sic*] conducted here is foreclosed by the Ninth Circuit's opinion. The court does not read the opinion as allowing the Department to re-visit an issue determined against it.

4. Application of Assessments to Generic Program.

In their opening briefs, plaintiffs contended that the amount of the refund should be determined by the percentage of the Board's projected budget for a relevant crop year that was allocated for generic advertising purposes. Plaintiffs argued that if, for example, 25% of an [*sic*] projected budget was allocated to the generic advertising program, then 25% of plaintiffs' assessments for that year should be refunded.

However, the Department has presented evidence by way of a declaration of Michael L.H. Marsh, C.P.A., asserting that each year's generic promotion activities were largely funded not from administrative assessments, but from monies received during the previous crop years from handlers who did not fully utilize their advertising credit and instead remitted an amount equivalent to their unused credit to the Board. Since neither Cal-Almond nor Saulsbury Orchard and Almond Processing (SOAP) ever remitted such funds to the Board during the period in question, they can have no claim to that portion of the generic promotion budget paid

from those carry-over funds. Although asserting that a final accounting has not yet been conducted, the Department asserts that a preliminary examination of the Board's financial records suggest that approximately 81% of the generic promotion program was funded by these carry-over funds. The Department argues that a supplemental factual inquiry is necessary in order to fully resolve these accounting issues.

In their reply briefs, plaintiffs concede that a supplemental factual inquiry will be necessary to resolve this issue.

5. "Passed Through" Costs.

The Department argues that the court must conduct a supplementary factual hearing to determine the extent to which the plaintiffs have "passed through" the costs of the advertising assessments to the growers for whom they handle almonds. The Department contends that if plaintiffs have passed through any of these costs, then a complete refund of advertising assessments to the handlers would unjustly enrich the plaintiffs.

In making this argument, the Department refers the court to cases involving refunds of excise taxes. *See Rothman v. District Director of Internal Revenue*, 483 F.2d 1079, 1080-1081 (9th Cir. 1973); *Travel Industries of Kansas, Inc. v. United* States, 425 F.2d 1297, 1298 (10th Cir. 1970).

However, plaintiffs refer the court to *McKesson v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990). In *McKesson,* wholesale liquor distributors filed suit challenging the Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida agricultural crops and then bottled in Florida. The Florida Supreme Court invalidated the excise tax as violating the Commerce Clause but refused to provide a refund or any other form of postpayment relief. In pertinent part, the United States Supreme Court rejected the Florida Supreme Court's reliance on two equitable considerations as grounds for denying retroactive relief:

> The Florida Supreme Court also speculated that 'if given a refund [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to [its] customers.' . . . The court's premise seems to be that the

State, faced with an obligation to cure its discrimination during the contested tax period and choosing to meet that obligation through a refund, could legitimately choose to avoid generating a 'windfall' for petitioner by refunding only that portion of the tax payment not 'passed on' to customers (or even suppliers). Even were we to accept this premise, the State could not refuse to provide a refund based on sheer speculation that a 'pass-on' occurred. We repeatedly have recognized that determining whether a particular business cost has in fact been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry; a court certainly cannot withhold part of a refund otherwise required to rectify an unconstitutional deprivation without first satisfactorily engaging in this inquiry.

In any event, however, we reject respondents' premise that 'equitable considerations' justify a State's attempt to avoid bestowing a so-called 'windfall' when redressing a tax that is unconstitutional because discriminatory. In *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386 . . . (1934), we enforced a statutorily created pass-on defense in a refund action designed to redress a tax overassessment. Comparing such an action to one in assumpsit for 'money had and received,' we affirmed the Federal Government's power in this equitable action to withhold the amount that the taxpayer had already passed on to others, on the theory that the taxpayer ought not to be 'unjustly enriched' by his recovery from the Government after he has already 'recovered' his losses through the pass-on. We observed that if the taxpayer 'has shifted the [economic] burden [of the tax] to the purchasers, they and not he have been the actual sufferers and are the real parties in interest,' . . . and he ought not receive a windfall for their injury.

But petitioner does not challenge here a tax assessment that merely exceeded the amount authorized by statute; petitioner's complaint was that the Florida tax scheme unconstitutionally discriminated against interstate commerce. The tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent that petitioner passed on the economic incidence

> of the tax to others), but also because it placed petitioner at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products ... To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs *(e.g.*, for advertising) in an effort to maintain its market share. The State cannot persuasively claim that 'equity' entitles it to retain tax moneys taken unlawfully from petitioner due to its pass-on of the tax where the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place. We thus reject respondents' reliance on a pass-on defense in this context.

496 U.S. at 46-49.

Plaintiffs argue that *McKesson* applies to preclude a pass through inquiry any time an assessment is found to be unconstitutional. Plaintiffs further argue that, because the Ninth Circuit has found that the regulations were designed to benefit Blue Diamond and since Blue Diamond benefitted from the regulations, Blue Diamond was able to out-compete plaintiffs for growers, offer the growers a better return, and cause economic injury to the plaintiffs.

At oral argument, defendant argues that plaintiffs' reliance upon *McKesson* is misplaced. Defendant contended that the nature of the constitutional violation must be examined in determining whether *McKesson* is applicable. In the case before the court, the First Amendment violations found to exist, by the Ninth Circuit imposes [*sic*] the same burden on all handlers. In *McKesson,* however, the constitutional violation at issue was a discrimination in violation of the Commerce Clause.

The court concludes that *McKesson* is controlling. Although the constitutional violations are different and the First Amendment does not normally involve discrimination, it cannot be gainsaid that the Ninth Circuit was of the opinion that the advertising program benefitted Blue Diamond to the detriment of other handlers, thereby placing those other handlers in a competative [*sic*] disadvantage.

6. Profit.

The Department further argues that the court should conduct a supplementary fact finding hearing to determine the extent to which plaintiffs profited from their own advertising expenditures incurred in order to receive credit against their annual assessments. In making this argument, the Department refers the court to the statement in the Ninth Circuit's opinion that "Saulsbury estimated that every dollar spent on creditable advertising returned less than fifty cents in sales." 14 F.3d at 438. In addition, the Department refers to the statement that "in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000." *Id.* at 438 n.8. The Department implies from these two statements that the Ninth Circuit explicitly conceded that the creditable advertising engaged in by the plaintiffs was not wholly ineffective. The Department asserts that the record establishes that plaintiffs made some sales as a result of their advertising expenditures that they would not have realized without those expenditures and that plaintiffs should subtract the sales actually resulting from creditable advertising from any request for a refund of monies spent on creditable advertising.

Plaintiffs oppose this request, calling it "just another distorted and depraved effort by the Government to delay and deprive Plaintiffs of their victory in the landmark Ninth Circuit decision."[5] Plaintiffs further assert that the reference to Saulsbury's evidence was to gross sales and not to net sales. Plaintiffs also argue that "if Saulsbury and Cal-Almond were not required to wastefully spend hundreds of thousands of dollars per year on Government ordered advertising, there can be no facts, other than utterly speculative facts, as to how much money the Plaintiffs would have made without said unconstitutional assessments, and if left with their money and with their own devices to promote their product in their own targeted markets."

Although the court can understand the logic of the Department's position, it is foreclosed by the Ninth Circuit's opinion just as the determination of the extent to the benefit to

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[5] Depraved, by the way, means marked by corruption, perversion or deterioration. I think that Brian is pitching it pretty strong.

plaintiffs from the invalidated programs should be foreclosed. As discussed by the Ninth Circuit, the programs did not benefit the participants sufficiently to overcome the constitutional infirmities. That being the case, the court agrees with plaintiffs that any further inquiry into profit moves into the realm of speculation.

ACCORDINGLY, IT IS ORDERED that the respective plaintiffs' Post-Remand Motions for Refund of Almond Board Assessments are granted.

IT IS FURTHER ORDERED that defendant's respective Motions for Remand are denied.

IT IS FURTHER ORDERED that the parties appear on Monday, September 26, 1994 at 1:30 p.m. for further proceedings in connection with the application of assessments to the generic program. The parties are ordered to be prepared to present their respective factual positions to the court with respect to this issue at this hearing.[6]

Dated: September 6,1994

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District
Judge

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[6] The court advises the parties that it will not issue any final orders with respect to refunds until this factual issue is resolved.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

D.C. DOCKET NO. CV-F-91-064-REC

CAL-ALMOND, INC., SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC. AND CARLSON FARMS, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

D.C. DOCKET NO. CV-F-91-122-REC
JUDGMENT AND ORDER THEREON

CAL -ALMOND, INC. PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

D.C. DOCKET NO. CV-F-91-123-REC

CAL-ALMOND, INC., A CALIFORNIA CORPORATION: GOURMET PACKING COMPANY, INC., A CALIFORNIA CORPORATION; AND GOLD HILLS NUT COMPANY, INC., A CALIFORNIA CORPORATION, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE AND THE UNITED STATES OF AMERICA, DEFENDANTS

D.C. DOCKET NO. CV-F-91-685-REC

CAL -ALMOND, INC. AND GOLD HILLS NUT COMPANY, INC., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

D.C. DOCKET NO. CV-F-92-5684-REC
JUDGMENT AND ORDER THEREON

CAL -ALMOND, INC.; GOLD HILLS NUT COMPANY, INC.; AND FRAZIER NUT FARMS, INC., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

[Lodged Sept. 19, 1996]

JUDGMENT AND ORDER

The above entitled cases came on for a hearing on July 18, 1994 as a result of the above entitled Plaintiffs' respective post-remand motions for refund of Almond Board assessments and the Defendants' respective motions on remand, following the Ninth Circuit Court of Appeals opinion in *Cal-Almond Inc. et al. vs. The United States Department of Agriculture* (and related cases), 14 F.3d 429 (9th Cir. 1993), which resulted in an order of this Court of September 6, 1994 in the above entitled cases. The issues to be resolved were the extent to which advertising assessments assessed against each of the Plaintiffs in the above entitled action should be refunded. Following this Court's order of September 6, 1994 parties agreed that the following sums of money were at issue for the almond crop years of 1980-1981 through 1991-1992 crop years.

CAL-ALMOND, INC.

A. Amounts spent on creditable advertising $1,433,619.96

B. Creditable advertising assessments paid to Almond Board $22,650.00

C. Amount of creditable advertising assessments placed in or credited to an attorney/client trust fund account $1,147,549.03

D. Portion of annual assessments applied towards the Almond Board's generic promotional activity $45,637.41

IT IS HEREBY ORDERED AND ADJUDGED THAT: The Defendants in the above entitled action are to forthwith pay to Cal-Almond, Inc. through its attorney, Brian C. Leighton at 701 Pollasky, Clovis, California 93612, the collective sums in paragraphs A, B and D above, the total amount of which is $1,501,907.37.

IT IS FURTHER ORDERED the amounts in paragraph C above, the amounts credited to the attorney/client trust fund account, are hereby released to Cal-Almond, Inc.

SAULSBURY ORCHARDS

A. Amounts deposited with the Clerk of the Court in that certain case entitled *United States of America vs. Saulsbury Orchards & Almond Processing*, No. CV-F-86-87 (EDP) now REC $529,406.25 plus accrued interest.

B. Amounts spent on creditable advertising $807,327.53

C. Portion of annual assessments applied towards the Almond Board's generic promotional activities $23,984.00

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants in the above entitled case forthwith pay to the Trustee, Ellen Briones at P.O. Box 14173, Pinedale, California 93650, Trustee of Saulsbury Orchards & Almond Processing in that certain bankruptcy action entitled In Re: Saulsbury Orchards & Almond Processing, Inc., a California corporation, Debtor, Case No. 91-10898A-11F (Chapter 11 proceeding now converted to a Chapter 7 proceeding) the sums listed in paragraph B above the total of which is $831,311,93. A separate court order and judgment thereon is being issued in case No. 86-87, described above, with respect to paragraph A above and directed to the Clerk of the Court.

CARLSON FARMS

A. Amount of creditable advertising assessments paid to Almond Board $38,128.19

B. Portion of annual assessments applied towards the Almond Board's generic promotional activities $00.00

IT IS HEREBY ORDERED AND ADJUDGED that the sum of $38,128.19 be forthwith paid by the Defendant in the above entitled action to Carlson Farms, through its attorney, Brian C. Leighton, 701 Pollasky Avenue, Clovis, California 93612.

GOLD HILLS NUT COMPANY, INC.

A. Amount spent on creditable advertising $180,438.50

B. Portion of annual assessments applied towards the Almond Board's generic promotional activities $3,399.42

IT IS HEREBY ORDERED AND ADJUDGED the total sums above, $183,837.92 be paid by the Defendant in the above entitled actions to Gold Hills Nut Company, Inc. through its attorney, Brian C. Leighton, 701 Pollasky, Clovis, California 93612.

FRAZIER NUT FARMS INC.

A. Amount spent on creditable advertising $64,468.67

B. Creditable advertising assessments paid to the Board $00.00

C. Amount of creditable advertising assessments placed in escrow (attorney/client trust fund account) $32,024.90

D. Portion of annual assessments applied towards the Almond Board's generic promotional activities $1,627.79

IT IS HEREBY ORDERED AND ADJUDGED that the total sums of money stated in paragraphs A and D, the total of which is $66,096.46 be forthwith paid by the Defendant in the above entitled actions to Frazier Nut Farms, Inc. through its attorney, Brian C. Leighton, 701 Polasky, Clovis, California 93612. It is further ordered that the amounts of creditable advertising assessments

placed in the attorney/client trust fund account be released to Frazier Nut Farms, Inc.

The Clerk of the Court is hereby directed to place a conformed copy of this order in the files of each of the above entitled cases.

September 19th, 1994

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 92-16033, 92-16034, 92-16031 AND 92-16527

CAL-ALMOND, INC., A CALIFORNIA CORPORATION
PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
DEFENDANT-APPELLEE

CAL-ALMOND, INC., A CALIFORNIA CORPORATION,
SAULSBURY ORCHARD AND ALMOND
PROCESSING, INC., CARLSON FARMS, A SOLE
PROPRIETORSHIP, PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
DEFENDANT-APPELLEE

CAL-ALMOND, INC., A CALIFORNIA CORPORATION,
GOURMET PACKING CO., A CALIFORNIA
CORPORATION, GOLD HILLS NUT CO., INC.,
A CALIFORNIA CORPORATION,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
DEFENDANT-APPELLEE

CAL-ALMOND, INC., A CALIFORNIA CORPORATION,
GOLD HILLS NUT CO., INC., A
CALIFORNIA CORPORATION, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA
DEFENDANT-APPELLEE

Argued and Submitted Jan. 12, 1993
Decided Dec. 22, 1993.

Before: CHOY, SCHROEDER, and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

Two groups of almond handlers are challenging various provisions of the California Almond Marketing Order, which regulates the California almond handling industry. Both groups challenge the United States Department of Agriculture ("USDA") almond marketing program administered by the California Almond Board (the "Board"). The first group is also separately challenging the assessment imposition procedure used by the Board from 1980 to 1986. The second group is separately challenging the validity of the reserve requirement rules for the crop years 1988-89 and 1990-91. The district court affirmed a USDA Judicial Officer decision upholding the Almond Marketing Order against these challenges, and the handlers appeal. We affirm the district court's decision on the assessment imposition procedure and the reserve requirement rules, but hold that the marketing program violates appellants' First Amendment rights to freedom of expression and association.

I. THE ALMOND MARKETING PROGRAM

A. Facts and proceedings below.

Appellants Cal-Almond, Saulsbury Orchards, and Carlson Farms are "handlers" of California almonds. They receive almonds from growers, process them, and sell the resulting product, primarily for use as ingredients in candy, ice cream, and cereal. Cal-Almond and Saulsbury also operate mail-order businesses through which they sell whole almonds.

The California almond handling industry is regulated by the Almond Marketing Order, 7 C.F.R. § 981 (the "Order"). The Order was established in 1950 by USDA pursuant to the Agricultural Marketing Agreemen Act of 1937, 7 U.S.C. § 608c (the "Act"). The purpose of the Act is to "establish and maintain

such orderly marketing conditions for agricultural commodities in interstate commerce" as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. §§ 602(1), 602(4) (1988). The Act authorizes the Secretary of Agriculture (the "Secretary") to issue, following notice and an opportunity for hearing, marketing orders that will "tend to effectuate the declared policy of [the Act]" with respect to the particular commodity. 7 U.S.C. § 608c(4) (1988).

The Order is administered by the Board, which has the power to "make rules and regulations to effectuate the terms and provisions" of the Order. 7 C.F.R. § 981.38 (1993). The Board has ten members, all of whom are industry representatives appointed by the Secretary. The Board engages in a variety of activities, including research and development, marketing, quality control, and volume regulation. The Act specifically provides that the Order may establish "marketing research and development projects designed to assist, improve, or promote the marketing" of almonds. 7 U.S.C. § 608c(6)(I) (1988). Pursuant to this authorization, the Board funds a generic pro-almond public relations program, consisting of such items as newspaper inserts containing almond recipes, leaflets and magazine articles about the benefits of almonds, promotional materials for school lunch programs, and press kits for industrial customers.

The money to pay for the Board's activities, including the marketing program, comes from assessments collected from handlers, based on the volume of almonds they handle. However, the Act and the Order provide that a handler's assessment will be reduced, up to a point,[1] by the amount that the handler spends on authorized advertising.[2] Before a handler can receive credit for his

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[1] A handler may receive credit against his assessment in an amount not to exceed "that portion of his assessment designated for marketing promotion including paid advertising." 7 C.F.R. § 981.41(c) (1993). For example, for the 1986-87 crop year, the overall assessment was 2.6¢ per pound, and the maximum credit was 2.5¢ per pound.

[2] The Act provides that handlers may receive credit "for such marketing promotion including paid advertising as may be authorized by the [O]rder." 7 U.S.C. § 608c(6)(I) (1988). The Order authorizes the Board, with the approval of the Secretary, to provide "for crediting all or any

marketing promotion expenditures, the Board must determine that such expenditures meet the requirements of the "creditable advertising regulations" set forth in 7 C.F.R. § 981.441.

The Order thus establishes an overall almond marketing program, which combines generic almond promotion conducted by the Board with Board-approved handler advertising. Beginning in 1984, appellant Saulsbury, which strongly opposed this program, refused to pay its annual assessments to the Board. In 1986, the United States sought an injunction in federal district court, pursuant to 7 U.S.C. § 608a(6), to compel payment of some $300,000 in assessments which Saulsbury allegedly owed and had not paid to the Board. *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1193 (9th Cir. 990). The district court granted summary judgment in favor of the government, and ordered Saulsbury to comply with the Order and pay the assessments. *Id.* The court refused to entertain Saulsbury's affirmative First Amendment defenses because it found that Saulsbury had not exhausted its administrative remedies pursuant to 7 U.S.C. § 608c(15)(A).

In April 1987, Saulsbury, joined by appellants Cal-Almond and Carlson Farms, filed an administrative petition, pursuant to 7 U.S.C. § 608c(15)(A), challenging numerous parts of the Order (including the almond marketing program) for the crop years 1980-87.[3] Following a hearing in the summer of 1989, a USDA administrative law judge ("ALJ") issued a decision on June 22, 1990 upholding some of appellants' challenges but rejecting others, including the challenge to the marketing program. Both sides ap-

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portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products, or their uses." 7 C.F.R. § 981.41(c) (1993).

[3] Saulsbury, believing that it would suffer irreparable injury if it were forced to exhaust its administrative remedies, also filed a complaint in district court, again alleging that the Order was unconstitutional. The district court again dismissed the action on the ground that Saulsbury had failed to exhaust its administrative remedies. *Saulsbury*, 917 F.2d at 1193. We affirmed the dismissal in *Saulsbury*. *Id.* at 1197.

pealed the ALJ's decision to the USDA Judicial Officer ("JO"). On January 23, 1991, the JO upheld the Order in all respects.

Meanwhile, Cal-Almond had filed another petition pursuant to 7 U.S.C. § 608c(15)(A), challenging a specific section of the creditable advertising regulations, 7 C.F.R. § 981.441(c)(2), for the crop year 1988. The ALJ upheld the challenge, but his decision was reversed by the JO. The two petitions were consolidated for cross-motions for summary judgment to the district court. On June 3, 1992, the district court issued an order upholding the JO's decisions in their entirety. Appellants appeal this order.

B. Standard of review.

We review de novo a district court's grant of summary judgment. *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir.1987). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

C. Discussion.

1. *Infringement on appellants' First Amendment rights.*

The district court held that the almond marketing program did not even implicate, let alone violate, appellants' First Amendment rights, "because plaintiffs are not 'compelled' to advertise." However, while the Order clearly does not compel appellants to advertise, it does compel them to expend a certain sum of money every year, on either assessments or creditable advertising. Since either alternative burdens appellants' First Amendment rights, these rights are clearly implicated by a program containing both.

Assume first that the creditable advertising regulations did not exist and that handlers paid the full amount of their assessment to the Board. A substantial portion of that amount would be used by the Board for the generic almond promotion program, which infringes on appellants' First Amendment right to be free from compelled speech and association. *See United States v. Frame*, 885 F.2d 1119 (3d Cir.1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct.

1168, 107 L.Ed.2d 1070 (1990). *Frame* involved a First Amendment challenge to the Beef Promotion and Research Order, 7 C.F.R. §§ 1260.101-.217, promulgated by USDA pursuant to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11. The Beef Promotion Order established a "Cattlemen's Board," whose goal would be to increase beef sales, and authorized it to collect an assessment of $1.00 per head of cattle from cattle producers and importers. *Id.* at 1122-23. Frame, a cattle breeder and auctioneer, refused to pay the assessment, and, when sued by the federal government, asserted that the Beef Promotion Act violated his First Amendment rights of free association and free speech. *Id.* at 1129.

The Third Circuit noted first that citizens arguably do not have the right to refuse to support financially government programs that involve speech they find objectionable. *Id.* at 1131. However, the court also found that the promotional expression sponsored by the Cattlemen's Board could not properly be characterized as "government speech"

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a *publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group*, the government has directly focused its coercive power for expressive purposes ... This sort of funding scheme [establishes a] close nexus between the individual and the message funded.

Id. at 1132 (citations omitted) (emphasis added). The court found that the Beef Promotion Act implicated Frame's First Amendment rights because it resembled other funding schemes that the Supreme Court had held to implicate individuals' First Amendment rights. *Id.* at 1132-33, citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (union-management agency shop agreements, which require that every employee pay the union a service charge equal in amount to union dues, impinge on

employees' rights to be free from compelled affirmation of belief and compelled association for expressive purposes) and *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (state law requiring citizens to bear state slogan, "Live Free or Die," on automobile license plates, implicates First Amendment rights because law requires individuals to participate in the dissemination of an ideological message).

The Board's almond promotion program closely resembles the beef promotion program at issue in Frame. In both cases, a "publicly identified group" (cattlemen or almond handlers) Must contribute money to fund the "dissemination of a particular message associated with that group." For the same reason that the beef program implicated Frame's First Amendment right to be free from compelled speech and association, then, the Board's promotional efforts implicate appellants'.

Assume next that the Order imposed on handlers no assessment or other compelled contribution to the Board whatsoever, but only required that they spend the equivalent sum every year on advertising that met the requirements of 7 C.F.R. § 981.441. Such an Order also would clearly implicate appellants' First Amendment rights, both because it would compel them to speak and because it would impose content-based restrictions on that speech. *See Wooley*, 430 U.S. at 714, 97 S.Ct. at 1435 ("the right of freedom of thought protected- by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

Thus, both an assessment-only program and an advertising-only program would implicate appellants' First Amendment rights. Because the Order is a combination of both, it implicates those rights as well. USDA's argument that the creditable advertising regulations do not implicate those rights because they do not "compel" appellants to advertise ignores the fact that if handlers do not advertise according to the regulations, they must contribute

their assessment to the Board,[4] which is itself a type of compulsion implicating appellants' First Amendment rights.

2. Type of speech restricted.

Having determined that the almond marketing program implicates appellants' First Amendment rights, we must now select the proper standard to evaluate the constitutionality of the program. Appellants claim, and we agree, that the program infringes on both their right to free speech and their right to free association. The Supreme Court has established different tests for each of these. Restrictions on lawful and non-misleading commercial speech[5] are evaluated using the three-prong standard of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). First, the asserted government interest behind the restrictions must be "substantial." *Id.* at 566, 100 S.Ct. at 2351. Second, the restrictions must "directly advance[ ] the governmental interest asserted." *Id.* Third, the restrictions must be "not more extensive than is necessary to serve that interest." *Id.*

Government programs that compel association are evaluated under a more stringent standard. The Supreme Court has

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[4] Handlers may also earn credits by engaging in other promotional activities, such as distributing sample packages of almonds to charitable or educational outlets, purchasing promotional materials available from the Board, or certain direct mail promotions. 7 C.F.R. 981.441(d)(1)(i)-(iii) (1993). The availability of such options does not change the First Amendment analysis; they simply represent other types of expressive activity the only alternative to which is the compelled assessment. In practice, the "vast majority" of creditable advertising expenditures are spent on advertisements and not on these alternatives.

[5] Commercial speech" is that which "propose[s] a commercial transaction." *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986) (quotation omitted). All of the promotional efforts undertaken by the Board, whether directly (through its own activities) or indirectly (through the inducements of the creditable advertising regulations), are aimed at increasing almond sales. The program therefore deals with commercial speech.

recognized that "[f]reedom of association ... plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). *See also IDK, Inc. v. Clark County*, 836 F.2d 1185, 1192 (9th Cir.1988) ("[t]he first amendment ... gives us the freedom not to assemble with those whose goals we do not share."). In *Roberts*, the Supreme Court held that infringements on the right of free association must be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623, 104 S.Ct. at 3252. The *Frame* majority applied this test to the Beef Promotion Act. *See Frame*, 885 F.2d at 1134. However, because we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard, we do not decide which of these two should apply. *See id.* at 1146 (Sloviter, J., dissenting).

Appellants contend that their own almond advertising contains a mixture of commercial and political speech and is therefore entitled to a higher level of protection under *Riley v. National Fed'n of Blind*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Riley addressed a First Amendment challenge to a North Carolina requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. *Id.* at 795, 108 S.Ct. at 2676-77. The Supreme Court found the regulation unconstitutional under strict scrutiny. *Id.* at 798,108 S.Ct. at 2678. The Court applied strict scrutiny because although the speech at issue was arguably commercial, and thus subject to a more deferential standard of review, "the speech [does not] retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech" — in that case, charitable solicitation. *Id.* at 796, 108 S.Ct. at 2677 (emphasis added).

In the present case, however, the commercial speech, although arguably "compelled," is not *inextricably* intertwined with higher-value noncommercial speech. Appellants' political appeals are not essential components of their advertisements. "[A]dvertising which

links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7, 105 S.Ct. 2265, 2274 n. 7, 85 L.Ed.2d 652 (quotation omitted). Thus, the Riley rationale for applying strict scrutiny is not present here.

3. Application of the Central Hudson test.

Once again, for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be "substantial," (b) the program must "directly advance" that interest, and (c) the program must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, ___ U.S. ___, ___, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

(a) Substantial government interest.

We "must identify with care the interests the State itself asserts." *Edenfield*, at ___, 113 S.Ct. at 1798. USDA claims that the government has a "compelling and important interest in promoting the consumption of almonds" in order to "provide for greater stability in the products of agriculture" and "protect the income of farmers." Brief for the Appellee at 32. The Act itself states that the purpose of the creditable advertising program is to "assist, improve, or promote the marketing, distribution, and consumption of [almonds]." 7 U.S.C. § 608c(6)(I) (1988). *See also* 36 Fed. Reg. 20,887, 20,888 (1971) (the program will "provide an additional method of stimulating almond consumption"); 35 Fed. Reg. 7428, 7432 (1970) (the program will provide the "opportunity to stimulate the demand for almonds"). We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest. *See Frame*, 885 F.2d at 1134 (government has a compelling interest in "maintaining and expanding beef markets" in order to "prevent [ ] further decay of an already deteriorating beef industry).

(b) Direct advancement of the interest.

Next, USDA must show that the program "directly advances the governmental interest asserted." *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. "[T]he regulation[s] may not be sustained if [they] provide[ ] only ineffective or remote support for the government's purpose." *Id.* at 564, 100 S.Ct. at 2350. Furthermore, we may not simply defer to legislative and executive judgment on this question; we must determine ourselves whether the program directly advances USDA's asserted interests. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n. 22, 104 S.Ct. 2118, 2127 n. 22, 80 L.Ed.2d 772 (1984). We apply this test first to the creditable advertising regulations specifically, and then to the overall almond promotion program.

Because the Order forces each handler to fund Board promotional efforts with every assessment dollar not spent on creditable advertising, USDA must show both that the advertising for which credit is *granted* is *better* at selling almonds than the Board's own efforts and that the advertising for which credit is *denied* is *worse* at selling almonds than the Board's own efforts. As a starting point for our analysis, therefore, we must determine how effective the Board's own almond promotion efforts are. USDA has presented little solid evidence on this question. The following exchange, which occurred at the hearing before the ALJ between counsel for Cal-Almond and Skip Hubbard, chairman of the Board's Public Relations and Advertising Committee, is highly instructive:

Q: [H]as the Public Relations and Advertising Committee since you have been chairman, ever hired somebody to analyze whether or not the creditable advertising rules and the assessment amount spent on advertising, have caused more sales of almonds?

A: It has not been — we have not ha[d] a survey conducted.

Q: So would it be safe to say that you don't have any empirical data as to whether or not the advertising assessments have assisted in the . . . sale and consumption of almonds?

A: No study has been made on that.

Q: Has any study been made as to whether or not certain provisions of section 981.441 have created more sales or less sales than other provisions?

A: We have not commissioned any study for that. [. . .]

Q: [. . .] Has the Almond Board, the Public Relations and Advertising Committee, ever made a determination as to whether or not the advertising itself, or the promotion itself, done by the Board has increased grower returns?

A: The Committee believes that the promotional activities are beneficial to grower returns.

Q: [. . .] Has any study been conducted?

A: No.

Transcript of 1/25/90 hearing before USDA ALJ Hunt at 158-60.[6] Because USDA has presented little or no evidence regarding the effectiveness of the Board's promotional efforts, it cannot show that the creditable advertising regulations "directly advance" the government's interest in increased almond sales by enhancing the effectiveness of those efforts.[7] *See Edenfield*, ___U.S. at ___, 113

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[6] Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that a professor at the University of California-Davis had conducted a study whose results demonstrated that the advertising program had been successful in increasing grower returns. However, this study is not part of the record.

[7] USDA asserts that creditable advertising may "reasonably be expected to increase the sale of almonds," Brief for the Appellee at 31, and cites to the rule-making records underlying the regulations to support its assertion. However, these records address only minor amendments to the regulations made during the past decade, and not to the initial adoption of the bulk of the regulations, including the most restrictive ones. *See, e.g.*, 49 Fed.Reg. 19,978 (May 10, 1984) (increasing the amount of credit handlers receive for advertising almond butter); 50 Fed.Reg. 16,451 (April 26, 1985) (doubling the portion of creditable advertising that may be carried over from one crop year to the next); 52 Fed.Reg. 13,427 (April 23, 1987) (allowing credit for the cost of purchasing mailing lists, envelopes and postage used in mail order promotions).

S.Ct. at 1800 (Florida Board of Accountancy fails to justify ban on personal solicitation of prospective business clients by accountants when it provides no studies or anecdotal evidence suggesting that such solicitation creates the asserted dangers of fraud, overreaching, or compromised independence).

In fact, most of the evidence in the record indicates that the regulations *hinder* the handlers' efforts to increase sales and returns to growers. For example, most of appellant Saulsbury's sales were to cereal companies, but Saulsbury could not receive credit for advertising the cereals containing its almonds because the regulations deny credit for products that do not contain at least 50 percent raw shelled almonds by weight and do not display the handler's brand. *See* 7 C.F.R. § 981.441(c)(3)(iv). When a chain of minimarkets in the Boise, Idaho area agreed to carry Saulsbury almonds, Saulsbury could not receive credit for advertisements directing consumers to those stores because the regulations deny credit for advertisements directing consumers to retail outlets not "operated" by a handler. *See* 7 C.F.R. § 981.441(c)(5)(iii). Because of these restrictions, Saulsbury estimated that every dollar spent on creditable advertising returned less than fifty cents in sales.

Cal-Almond's experience with the regulations was similarly disappointing. Cal-Almond exports approximately 90 percent of its almonds for use as ingredient items, and nearly all of the almonds it sells domestically are used in ice cream. However, like Saulsbury and cereal, Cal-Almond cannot obtain credit for advertising this ice cream because the regulations forbid it. The only creditable advertising of any use to Cal-Almond is that promoting its mail order business, which is not a profitable undertaking.[8] Overall, the evidence indicates that the regulations hinder, rather than help, appellants' efforts to sell their almonds.

Finally, there is no evidence that the regulations stimulate additional or more effective advertising from other handlers. Blue Diamond is by far the largest handler and overwhelmingly

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[8] For example, in 1987 Cal-Almond spent nearly $300,000 advertising the business but its gross mail order sales were less than $100,000.

dominates the retail market;[9] to "directly advance" the government interest in increasing almond sales, the regulations would have to give Blue Diamond an incentive to advertise more. The record indicates, however, that they do not. Roger Baccigaluppi, the president and chief executive officer of Blue Diamond, testified that Blue Diamond would "probably" continue to spend just as much money advertising even if the regulations did not exist. Walter Payne, Blue Diamond's vice president for sales, marketing and distribution, testified that Blue Diamond would advertise the same amount and in the same manner in the absence of the regulations.

In sum, the record indicates that the regulations do not stimulate additional or more effective advertising from Blue Diamond. Appellants have presented evidence showing that the regulations hinder their own marketing efforts, and USDA has presented no evidence that the regulations assist the efforts of other handlers. Therefore, we hold that the regulations do not "directly advance" the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellants' First Amendment rights.

Whether the entire assessment-funded almond promotion program "directly advances" the governmental interests in increased almond sales and returns to growers is a more difficult question. The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("[w]e think [that] the legislature's belief [that advertising of casino gambling would serve to increase the demand for the product advertised] is a reasonable one"); *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353 ("[t]here is an immediate connection between advertising and demand for electricity."). Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand (although, as noted above, the Board does not know how significant the effect is).

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[9] As of July 1987, Blue Diamond had a 92 percent share of almonds sold in grocery stores.

However, because these efforts are funded with money that handlers would presumably have spent on their own advertising, we cannot compare the Board's program with a no-advertising situation; we must compare it to a situation where handlers spent their assessments on their own marketing. USDA has presented no evidence tending to show that the generic Board promotion financed by that money sells almonds more effectively than the specific, targeted marketing efforts of individual handlers.[10] We agree with appellants' argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson. The USDA has failed to meet its burden of showing that the overall almond marketing program "directly advances" its stated goals of selling more almonds and increasing returns to producers.[11]

(c) Not more extensive than necessary.

USDA must prove that the regulations are no more extensive than necessary to serve the interest of increasing almond sales. The Supreme Court held in *Board of Trustees of State Univ. v. Fox* that this standard is not as strict as a "least restrictive means" test:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope

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[10] Once again, appellants have presented evidence to the contrary. Cloyd Angle, the president of Cal-Almond, testified that the best way for him to sell almonds is to bring potential customers to his plant and show them the cleanliness and efficiency of his processing facilities. Spending money on generic Board promotion does not help him do this.

[11] The *Frame* majority held that mandatory assessments to the Cattlemen's Board advanced the goals of the Beef Promotion Act because they "prevent[ed] 'free riders' from receiving the benefits of the promotion and research program without sharing the cost." *Frame*, 885 F.2d at 1135. USDA could make a similar argument here (although it has not). Such a conclusion, however, presumes that the promotion itself advances the goals of the Act, a presumption that we have rejected.

> is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989).

USDA asserts that "[a]lthough it is possible that some forms of advertising, though ineligible for credit, might also increase the sale of almonds, the regulations reflect a reasonable judgment that the Board will make better use of those monies in its market promotion programs." However, once again, USDA offers no evidence in support of this "reasonable judgment." It certainly seems reasonable to assume that the advertisements for which credit is explicitly *permitted* — generic advertisements, expenditures for advertisements announcing future promotion activities, and in-store supermarket advertisements — will increase almond sales. However, USDA offers *no* justifications for the restrictions that *deny* credit for certain advertisements: ads promoting more than two complementary branded products (§ 981.441(c)(5)(i)), ads promoting a product that also has "competing nuts" (§ 981.441(c)(5)(ii)), or ads promoting retail stores not owned by handlers (§ 981.441(c)(5)(iii)). It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. This court has interpreted *Fox* as holding that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991). The creditable advertising regulations disregard such means, and therefore are more extensive than necessary to serve the interest of increasing almond sales. As the USDA has failed to present sufficient evidence to satisfy the requirements of the *Central Hudson* test, the Almond Marketing Program violates appellants First Amendment rights.

II. THE ASSESSMENT IMPOSITION PROCEDURES

A. Facts and proceedings below.

As noted above, the funds required to finance the Board's activities are generated through assessments authorized by the Act.

The Order specifically provides that the assessment shall be "such rate per pound of almonds . . . received by [the handler] for his own account ... as the Secretary finds is necessary to provide funds to meet the authorized [B]oard expenses and the operating reserve requirements." 7 C.F.R. § 981.81(a) (1993).

For the crop years 1980 through 1986, USDA issued final rules containing budget estimates and assessment rates without first publishing a proposed rule and requesting comments. Appellants contend that this procedure violated the rule making requirements of the Administrative Procedure Act (APA), which requires "[g]eneral notice of proposed rule making.. . unless persons subject thereto are named and either personally served or otherwise have actual notice thereof." 5 U.S.C. § 553(b) (1988) (the "notice" requirement). The agency is also required to give "interested persons an opportunity to participate in the rule making" (the "comment" requirement) and "[a]fter consideration of the relevant matter presented ... incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1988). In addition to the time required for the notice-and-comment procedure, an additional thirty days must pass between the time the final rule is passed and the time it takes effect. 5 U.S.C. § 553(d) (1988).

Following appellants' administrative challenges to the assessment imposition procedure,[12] the ALJ found that notice and comment pursuant to the APA should have been allowed. The JO disagreed and ruled that "good cause" existed for dispensing with notice and comment because the Secretary had discretion to authorize such expenses as were reasonable and likely to be incurred and because arriving at the assessment rate was a ministerial and mechanical calculation. The district court agreed with the JO.

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[12] Outlined in section I.A. above.

B. Discussion.

1. Notice and comment.

We review de novo "the district court's determinations on issues of statutory interpretation, including the scope of the notice-and-comment and publication requirements imposed by the APA." *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1011 (9th Cir.1987). We hold that although the assessments are "rules" subject to the notice-and-comment requirement of the APA, the Secretary's failure to give notice and request comments was harmless.

The APA defines a "rule" as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and *includes the approval or prescription for the future of rates.*

5 U.S.C. § 551(4) (1988) (emphasis added). We agree with appellants that establishing an assessment is a "prescription for the future of rates." The Order itself defines the assessment as a "rate per pound of almonds." 7 C.F.R. § 981.81(a) (1993). USDA's argument that the assessment procedure is not a rule because it is simply the mechanical result of the Secretary's approving an agency's budget fails under the D.C. Circuit's opinion in *Batterton v. Marshall,* 648 F.2d 694 (D.C.Cir.1980). There, the court held that the exemption for budgetary approval does not apply "where the agency action trenches on substantial private rights and interests." *Id.* at 708 (footnote omitted). Because the assessment rate directly affects the financial interests of appellants and other almond handlers, it is not exempt from the notice-and-comment requirements of the APA.

The district court held that the Secretary's failure to follow the notice-and-comment procedure was excused by the "good cause" exception to the APA, which excuses such failure

> when the agency for *good cause* finds (and incorporates the finding and a brief statement of reasons thereof in the rules

> issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(B) (1988) (emphasis added). The announcement accompanying the rules provided the following justification for dispensing with the notice-and-comment procedure:

> To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expense and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the [A]ct it is necessary to make these provisions effective as specified.

45 Fed.Reg. 56,794 (1980). USDA contends that since the Board's annual harvest forecast and proposed budget both depend on crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA.[13]

We disagree, based on our opinion in *Riverbend Farms Inc. v. Madigan*, 958 F.2d 1479 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 598, 121 L.Ed.2d 535 (1992). In *Riverbend Farms*, handlers of navel oranges challenged the procedure used by the Secretary to set weekly volume restrictions on the marketing of the oranges. We first noted that

> the good cause exception goes only as far as its name implies: It authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with the APA by complying with those APA requirements it is capable of complying with.

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[13] The Board recommended assessment rates at the annual July meeting. However, in the years from 1980 to 1986, the earliest the Secretary issued the final rule was August 26 in 1980, and the latest was October 19 in 1982.

Id. at 1485. We then held that even though the volume-setting meetings were conducted weekly, the Secretary had no reason not to give notice of them (by means of publication in the *Federal Register)* or allow written comments before promulgating weekly volume restrictions. *Id.* at 1486. Because we found no reason in *Riverbend Farms* to depart from the notice-and-comment procedure for *weekly* meetings and rules, we can discern no good cause here for the Secretary's failure to follow the procedure for annual meetings and rules.

We also cannot find good cause for the failure to wait thirty days before allowing the rule to take effect. In *Riverbend Farms*, we noted two reasons for the waiting period: it gives affected parties time to adjust their behavior before the final rule takes effect, and it usually causes no harm. *Id.* at 1485. These reasons apply to the almonds context. From 1980 to 1986, delaying the effective date of the rules by thirty days would have caused no harm, because the Secretary always waited at least thirty days before adopting a final rule anyway. Furthermore, the thirty days would have given handlers an opportunity to estimate their future costs and prices before the rule went into effect. Therefore, we can see no reason not to follow this requirement, and hold that the Secretary has failed to provide good cause for his failure to follow the procedure mandated by the APA.

However, we find this failure to be harmless. "We have held that the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" *Riverbend Farms*, 958 F.2d at 1487 (quoting *Sagebrush Rebellion, Inc. v. Hodel,* 790 F.2d 760, 764-65 (9th Cir.1986)). Our harmless error analysis "must therefore focus on the process as well as the result." *Id.* (emphasis added). In *Riverbend Farms,* we ultimately concluded that the Secretary's failure to comply with the APA's notice-and-comment requirements in promulgating the weekly navel orange volume restrictions was harmless because the handlers knew that there would be meetings every Tuesday, that proposed restrictions would be contained in a position paper issued prior to the meetings, and that the meetings would provide the opportunity for public comment. Therefore, the handlers were not prejudiced by the

Secretary's failure to follow the notice and comment procedure, and the error was harmless. *Id.* at 1488.

The Secretary's error in the instant case is harmless for the same reasons. The Board holds open meetings in July of each year to gather information relevant to estimating its budget and the resulting assessment rate. During these meetings, the Board receives comments and testimony from any and all interested parties. After deciding on its recommendations, the Board directly notifies each almond handler of the proposed assessment rate. The Board then submits its recommendations to the Secretary for approval; from 1980 to 1986, the assessment rate set by the Secretary in the final rule was the same as the rate that had been recommended by the Board. Therefore, under *Riverbend Farms*, any error made by the Secretary in not following the notice and comment procedure was harmless.

2. *Validity of allegedly "retroactive" assessments.*

From 1980 to 1986, the final rules establishing the annual assessments were not issued by the Secretary until at least several weeks after the beginning of the crop year. However, appellants had by that time already received a significant quantity of almonds, and the assessments were applied to those almonds as well. Appellants claim that doing so transformed the assessments into impermissible "retroactive" rules.

The Supreme Court has noted that administrative rules must be statements that have legal consequences only for the future. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217, 109 S.Ct. 468, 476, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring). "Retroactive" rules — those that alter the past legal status of past actions — are "not favored in the law." *Id.* at 208, 109 S.Ct. at 471. However, they are permitted if the power to promulgate them "is conveyed by Congress *in express* terms." Id. (emphasis added).

We agree with the district court that even if the assessments are retroactive rules, Congress expressly granted the Secretary the power to promulgate them. The Act provides that handlers shall pay assessments for such expenses "as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him." 7 U.S.C.

§ 610(b)(2)(ii) (1988). Since the Order specifies the crop year to be the relevant "period," the Secretary may impose the assessment on all almonds received during that time. As the district court pointed out,

> [t]he statutory language of Section 610(b)(2)(ii) mandates that each handler's pro rata share of the Almond Board's expenses must be based on the volume of all of the commodity covered by the marketing order. The focus of the statute is on the 'expenses likely to be incurred ... during any period specified by [the Secretary].' The period specified by the Secretary is the crop year July 1 through June 30. Therefore, the statute requires a handler to share pro rata in any expenses likely to be incurred by the Almond Board during a crop year.

We hold that even if the assessment rules are "retroactive," they are permissible because they were authorized by Congress in the Act.

3. Statement of basis and purpose.

Appellants contend that the final 1980-1986 assessment rules failed to comply with the substantive requirements of the APA because they did not include a "general statement of their basis and purpose" as required by 5 U.S.C. § 553(c). However, regulations with no statement of basis and purpose have been upheld where the basis and purpose was considered obvious. *See Citizens to Save Spencer County v. E.P.A.*, 600 F.2d 844, 884 (D.C.Cir.1979). This is just such a case. The "purpose" of the assessment is clearly to fund the Board's operations, and the "basis" of the rate is the mechanical application of the statutory formula. Because the basis and purpose of the assessment rate are obvious, no express statement was necessary to comply with the APA.

III. THE RESERVE REQUIREMENTS

A. Facts and proceedings below.

The reserve requirement is the mechanism the Board uses to regulate the volume of almonds entering the market, pursuant to the Act's goals of protecting almond prices and maintaining an orderly flow of almonds to market. 7 U.S.C. § 608c(6)(A), (C) (1988). Every year, the Board recommends to the Secretary what

percentage of the total almond crop should be "salable" and what percentage should be held in "reserve" by handlers. 7 C.F.R. § 981.49 (1993). Handlers may only sell the salable percentage of almonds they receive; they must withhold from marketing an amount equal to the reserve percentage. 7 C.F.R. § 981.50 (1993). The Secretary designates the final percentage based on the Board's recommendation and "any other available information." 7 C.F.R. § 981.47 (1993).

The almond crop year begins on July 1 and ends June 30. 7 C.F.R. § 981.19 (1993). For the 1988 crop year, the Board recommended a 25 percent reserve requirement on July 20, 1988; the Secretary issued a proposed rule incorporating this recommendation on September 16, 1988, allowing 15 days for comment; and issued the final rule establishing the 25 percent reserve requirement on January 25, 1989. For the 1990-91 crop year, the Board recommended a 35 percent reserve requirement; the Secretary issued a proposed rule on August 10, 1990, with the same 15-day comment period; and the Secretary issued the final rule on September 21, 1990.

Appellants Cal-Almond, Gourmet Packing, and Gold Hills filed administrative petitions, pursuant to 7 U.S.C. § 608c(15)(A), challenging the lawfulness of the procedures used by the Secretary to establish the 25 percent reserve requirement for the 1988-89 crop year; the validity of certain actions that the Board and Secretary require handlers to take to comply with the reserve requirement; and the validity of Secretary's imposing assessments on reserve almonds. After consolidation, the ALJ rejected most of the challenges, but held that the 1988-89 reserve and assessment rules were invalidly retroactive. On appeal, the JO upheld the Secretary's actions in all respects and the district court did the same.

Appellants Cal-Almond and Gold Hills had also filed an administrative petition challenging various USDA actions under the Order for the crop year 1990-91. The ALJ rejected their challenges and the JO affirmed. After appellants filed suit in district court, the parties stipulated that the district court should grant summary judgment for USDA without prejudice to appellants' right to

appeal, which the district court did. Appellants appeal both judgments.

B. Discussion.

1. *Lawfulness of 1989-90 and 1990-91 reserve obligation rules.*

(a) Retroactivity.

Appellants claim that the 1988-89 and 1990-91 reserve obligation rules were unauthorized retroactive rules. We hold that even if the rules were retroactive, they were expressly authorized by Congress and were therefore valid. *Georgetown Univ. Hosp.*, 488 U.S. at 208, 109 S.Ct. at 471-72. The Act provides that marketing orders may contain terms

> [a]llotting, or providing methods for allotting, the amount of [a] commodity ... which each handler may market ... under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity . . . to be marketed . . . during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

7 U.S.C. § 608c(6)(C) (1988). The focus of the statute is on the total quantity of almonds to be marketed during any period specified by the Secretary-in this case, the July 1-June 30 crop year. The statute requires the total quantity of almonds salable during this period to be allotted "equitably" among the handlers. To do so, the Secretary has to take into account almonds shipped between the beginning of the crop year and the issuance of the final reserve rule. Thus, the reserve obligation rules, even if retroactive, are authorized by the Act.

(b) Arbitrariness.

We may set aside an agency's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens for Clean Air v. E.P.A.*, 959 F.2d 839, 844 (9th Cir.1992) (quotation omitted). Appellants contend that the final 1988-89 reserve obligation rule was arbitrary and capricious

because it was issued after undue delay. The Board recommended the 25 percent reserve obligation on July 20, 1988. The Secretary issued a proposed rule on September 16, 1988, but did not issue a final rule until January 25, 1989, over four months later, and seven months into the crop year. According to appellants, the most active times for almond sales are in late summer and early fall; consequently, appellants argue, it was arbitrary and capricious for the Secretary to have waited until well after this time had passed to issue a final reserve obligation rule.

However, appellants have cited no cases, and we have found none, holding that an agency's delay in issuing a rule makes the rule itself arbitrary or capricious. Therefore, although the delay was certainly unfortunate and should be avoided in the future, it was not arbitrary or capricious.[14]

Appellants also contend that the 1988-89 and 1990-91 reserve obligation rules were arbitrary and capricious because they did not include a sufficient statement of basis and purpose as required by 5 U.S.C. § 553(c). We disagree. In the 1988-89 rule, USDA set out its calculations of supply and demand for California almonds and explained why a 25 percent reserve obligation was necessary:

> While this rule may restrict the amount of almonds which handlers may sell in normal domestic and expert markets, the salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. The reserve percentage is designed to reduce the oversupply situation in the industry in the 1988-89 crop year by holding off the market a percentage of the available almonds that could be added to an already fully supplied market. If the reserve were zero and all available California almonds were salable, almond prices, in a market which

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[14] The cases cited by appellants address the adequacy of agency explanations of the *contents* of their rules, not the delays in promulgating them. *See, e.g., North Germany Area Council v. Federal Labor Relations Auth.*, 805 F.2d 1044 (D.C.Cir.1986); *Celcom Communications Corp. v. F.C.C.*, 789 F.2d 67 (D.C. Cir. 1986).

> already has record supplies on hand, would be expected to drop in both domestic and foreign markets. Thus, the Board's recommendation for a 25 percent reserve is designed to effectuate the purposes of the Act by avoiding unreasonable fluctuations in supplies and prices.

54 Fed.Reg. 3584 (1989). A similar statement was included for the 1990-91 reserve obligation rules. *See* 55 Fed.Reg. 38,793, 38,794 (1990). Both statements explain the rules' basis (almond supply and demand estimates) and purpose (avoiding unreasonable fluctuations in supplies and prices).

Furthermore, USDA addressed the primary comments on the proposed reserve obligations that were made during the 15-day notice and comment period, such as objections to the crop size estimates, demand estimates, and reserve obligation size. *See* 54 Fed.Reg. 3584, 3585-87 (1989); 55 Fed.Reg. 38,793, 38,794-97 (1990).[15] The rules thus satisfied the requirement that they "indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did." *Independent United States Tanker Owners Comm. v. Dole,* 809 F.2d 847, 852 (D.C.Cir.), *cert. denied*, 484 U.S. 819, 108 S.Ct. 76, 98 L.Ed.2d 39 (1987).

Finally, appellants claim that the reserve obligation rules were arbitrary and capricious because USDA did not follow the dictates

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[15] The following example is illustrative:

> Many commenters who opposed the 35 percent reserve indicated that there is an over production of California almonds and that holding almonds in reserve this year will add to the surplus in following years. Over the past decade, however, annual marketable production has failed to meet trade demand needs for the 1983-84, 1985-86, 1986-87, and 1989-90 crop years. Given the wide swings in production from year to year which characterize the almond industry, it is possible that the 1991 crop could fall short of 1991-92 trade demand needs. If early projections of the 1991 crop indicate that this would likely be the case, an appropriate quantity of 1990-91 crop year reserve almonds would be released to the salable category to augment 1991-92 crop year supplies.

55 Fed.Reg. 38,793, 38,794 (1990).

of Departmental Regulation (DR) 1512-1 in promulgating them. We have no authority to review appellants' challenge, because section 1 of DR 1512-1 states that "[t]his directive ... is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person." *See Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (this language evinces "clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review").

2. *1990-91 agency agreements for reserve almond disposition.*

A handler has two alternatives for disposing of reserve almonds. First, the handler may turn them over to the Board, which has the "power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable." 7 C.F.R. § 981.66(a) (1993). The Board then distributes the proceeds from such disposition to the handlers on a pro rata basis. 7 C.F.R. § 981.66(g) (1993). Alternatively, the handler may obtain authorization from the Board to act as the Board's agent in disposing of the reserve; all agents so authorized must sign agency agreements with the Board which contain "such reasonable terms and conditions, including inspection and certification requirements, as the Board may specify". 7 C.F.R. § 981.67 (1993).

The agency agreements for the crop year 1990-91 contained a provision stating: "If established by the Secretary, minimum prices will apply to reserve almonds diverted to eligible outlets . . . Agents will be notified of any such minimum price schedule established." Appellants contend that because the agency agreements include this provision, they violate both the Act and the APA.

(a) Agency agreements and the Act.

Appellants claim that the minimum price provision violates the Act because the Act forbids the fixing of prices with respect to almonds. This is incorrect; the Act is silent regarding whether agricultural marketing orders may set the prices that handlers

receive from their customers.[16] The Act does state that almond marketing orders may provide for the establishment of reserve pools of almonds and provide "for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E) (1988). The Almond Marketing Order further provides that "[t]he Board shall have power and authority to sell or dispose of any and all reserve almonds withheld *upon the best terms and at the highest return obtainable*." 7 C.F.R. 981.66(a) (1993) (emphasis added). Because including minimum price provisions in agency agreements is consistent with this mandate, we hold that the agreements do not violate the Act.

(b) Agency agreements and the APA.

Appellants contend that the minimum price provision was an "additional regulation" requiring the Secretary to follow the APA's notice-and-comment procedure before adopting the agency agreements.[17] Appellants cite *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C.Cir.1987), in support of their argument. In *American Hosp. Ass'n*, the D.C. Circuit addressed the issue of whether the Department of Health and Human Services (HHS) had to subject certain of its contracts to APA notice and comment. As part of the Medicare program, HHS was required to contract with "peer review organizations" (PROs), private organizations of doctors that would monitor the professional activities of Medicare service providers in their areas. *Id.* at 1041. Congress granted

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[16] Appellants quote our observation in *Pescosolido v. Block*, 765 F.2d 827 (9th Cir.1985), that "the Secretary is not empowered to fix prices for any [commodities other than milk] covered by the Act." *Id.* at 830. *Pescosolido* is inapplicable to the present case because it dealt with the prices that handlers pay to producers, not the prices that handlers receive from their customers.

[17] Agency agreements are contracts, and the APA does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefit, or contracts." 5 U.S.C. § 553(a)(2) (1988) (emphasis added). In 1971, however, USDA promulgated a regulation making the APA's procedural requirements applicable to all of its rule making relating to contracts. 36 Fed.Reg. 13,804 (1971).

HHS great discretion to contract with each PRO as it saw fit, in order to tailor the service review process to local needs. *Id.* at 1053. The statute provided specifically that

> Contracting authority of the Secretary under this section may be carried out without regard to any provision of law relating to the making, performance, amendment or modification of contracts of the United States as the Secretary may determine to be inconsistent with the purposes of this part.

Id. (quoting 42 U.S.C. § 1320c-2(e)). The D.C. Circuit held that this statutory language exempted HHS only from "the vast corpus of laws establishing rules regarding the procurement of contracts from the government," and did not exempt HHS from the "general restraints" of the APA. *Id.* at 1054. More specifically, the language did not "restor[e] a broad exemption from all APA requirements that would allow HHS on its own to modify vitally important provisions of peer review." *Id.* The court found that since Congress had granted HHS very broad discretion to implement the peer review program through individualized contracts with PROs, the danger of HHS' "legislating" the program through contractual terms was too high unless those terms were subject to APA notice and comment. *Id.* The court concluded that "any contract provisions that are legislative are subject to § 553's notice and comment requirements." *Id.* (emphasis added).

We find the agency agreements to be distinguishable from the PRO agreements at issue in *American Hosp. Ass'n.* There, the central mechanism for implementing the entire peer review program was the PRO contracts, because Congress had mandated that HHS enter into such a contract with a PRO in each area. Thus, there was a real danger that HHS would assume the role of unelected legislative body and promulgate statutory law under the guise of PRO contract terms. Here, by contrast, the agency agreements are incidental to the administration of the Order; they simply give handlers another, perhaps preferable, option for disposing of their reserve almonds. Unlike the program at issue in *American Hosp. Ass'n,* USDA is not required to enter into agreements with handlers, nor is any individual handler required to enter into an agreement with USDA. Because the agreements are incidental to

the entire program, and because handlers have another option, there is little danger that USDA will legislate through agency agreements.

Furthermore, even if the agency agreements did raise the dangers identified in *American Hosp. Ass'n,* the only provision that appellants specifically object to — the minimum price provision — is not "legislative" and thus would not be subject to APA procedures. The Act grants the Secretary the power to "provid[e] for the equitable distribution of the net return derived from the sale [of the reserve pool] among the persons beneficially interested therein." 7 U. S. C. § 608c(6)(E) (1988). We held above that a minimum price provision is a legitimate means of enforcing this requirement; the provision is thus a "procedural" rule exempt from the APA's requirements. *See American Hosp. Ass'n,* 834 F.2d at 1055 ("procedural" rules, those that are "legitimate means of structuring [the agency's] enforcement authority," are exempt from the APA notice and comment requirement).

3. *Restrictions on handlers' disposition of reserve almonds.*

(a) Reserve almond storage requirements.

During the 1988-89 crop year, the Board informed handlers that their reserve almonds had to be stored in California. The Board instituted this requirement without following the procedural rule making requirements of the APA. Appellants argue that the California storage rule is a substantive rule that could have been promulgated only through compliance with the APA.

The Order grants the Board the power to "receive, investigate and report to the Secretary complaints of violations of [the Order]." 7 C.F.R. § 981.38 (1993). To aid the Board in exercising this power, the Order also provides that "[e]ach handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of [certain] records and for inspection and observation of almonds." 7 C.F.R. § 981.70 (1993). The California storage rule helped ensure such accessibility and was thus a "legitimate means of structuring [the agency's] enforcement authority." *American Hosp. Ass'n,* 834 F.2d at 1055. We hold that the California storage requirement, like the minimum price pro-

vision, was a "procedural" rule exempt from the APA notice-and-comment requirements.[18]

(b) Future sales contracts for reserve almonds.

The Order prohibits the "handling" of reserve almonds. 7 C.F.R. § 981.50 (1993). The Order defines "to handle" as "to sell" or "to put into channels of trade." 7 C.F.R. § 981.16 (1993). In December 1988 USDA sent out a letter stating that it considered a contract for the disposition of reserve almonds entered into before the release of the reserve to be a "sale" and thus a prohibited act of "handling." Effectively, then, USDA prohibited handlers from entering into contracts to sell reserve almonds.

Appellants contend that this letter was a rule that should have been promulgated pursuant to the notice and comment requirements of the APA. However, "interpretive" rules — "those which merely clarify or explain existing law or regulations" — are exempt from these requirements. *Linoz v. Heckler,* 800 F.2d 871, 877 (9th Cir.1986) (quotation omitted); 5 U.S.C. § 553(b)(A) (1988). USDA's prohibition on the prerelease sale of reserve almonds is just such a rule, because it interprets the Order's prohibition on the handling of reserve almonds. The rule is therefore exempt from APA notice and comment.

4. *Assessments on reserve almonds.*

USDA currently imposes assessments on the total quantity of almonds received by handlers, including those in the reserve. Appellants contend that both the Act and the Order prohibit USDA from doing so.

We disagree. The Act states that each handler shall be assessed pro rata for reasonable Board expenses

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[18] While storing almonds in California may have inconvenienced appellants, the mere fact that a rule may have a substantial impact "does not automatically transform it into a legislative rule." *State ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm'n,* 966 F.2d 1541, 1554 (9th Cir.1992) (quotation omitted).

> other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency *for the benefit or account of persons other than handlers subject to such order.*

7 U.S.C. § 610(b)(2)(ii) (1988) (emphasis added). Appellants argue that the Board does not dispose of the reserve almonds "for the benefit of" the handlers and that therefore the Board cannot impose assessments on those almonds to cover the expenses of doing so. However, the proceeds from the Board's disposition of a handler's almonds are turned over to the handler. 7 U.S.C. § 608c(6)(E) (1988); 7 C.F.R. § 981.66(g) (1993).

We also reject appellants' contention that the Order prohibits the imposition of assessments on reserve almonds. The Order states that a handler shall only be assessed on almonds "received by him for his own account." 7 C.F.R. § 981.81(a) (1993). All reserve almonds are originally "received" by handlers for their own account, and thus subject to assessment. Only after being received by handlers are a certain percentage of almonds then "held" for the account of the Board. Even then, they are not really held for the account of the Board in the sense of the Board's receiving the proceeds from the disposition thereof, because the handlers get those proceeds. This terminology and regulatory structure is admittedly somewhat ambiguous, but "where Congressional intent is ambiguous, courts should defer to a reasonable agency interpretation of a statutory scheme the agency is entrusted to administer." *Railway Labor Executives' Ass'n v. I.C.C.,* 958 F.2d 252, 256 (9th Cir.1991). We defer to USDA's reasonable interpretation of the Order.

IV. THE ADMINISTRATIVE REMEDY PROCEDURE

Appellants finally contend that the long and tortuous path they have had to follow to exhaust their claims violates their right to due process. While we understand appellants' frustration with the administrative remedy procedure, we must also reject their argument. Appellants claim that the procedure does not provide petitioners with a "clear and certain remedy;" however, we have already held that a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found

not to have been due. *Saulsbury Orchards*, 917 F.2d at 1195 (quoting *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir.1983)).[19] As for the amount of time appellants have spent pressing their claims, we agree with the district court's reasoning that

> [w]hile there is no question that completion of the administrative process in connection with this Section 15(A) petition was very lengthy, it is also apparent that some of the delay resulted from the sheer number and magnitude of the issues raised in the petition as well as from the litigation tactics adopted by plaintiffs . . . [T]he court thinks it unrealistic of plaintiffs to expect prompt resolution of the quality and quantity of issues raised herein.

The length of the proceedings, although certainly regrettable, was not a denial of due process.

V. CONCLUSION

We affirm the judgments for USDA on all issues except the almond marketing program, which we find to violate the First Amendment. We are now faced with the question of what remedy to grant to appellants. Appellants request a full refund of the assessments imposed upon them from 1980 to the present, as well as attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Because of the fact-intensive nature of the inquiry, we find that "[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court." *Chicago Teachers Union v. Hud*son, 475 U.S. 292, 310, 106 S.Ct. 1066, 1078, 89 L.Ed.2d

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[19] Contrary to appellants' contention, the Supreme Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), does not require the remedy to consist of compensatory damages. The Court held only that an appropriate remedy for taxes unlawfully collected from plaintiff could either be a refund of taxes unlawfully collected or an assessment and collection of back taxes from the plaintiffs competitors. *Id.* at 40, 110 S.Ct. at 2252. *McKesson* never held that compensatory damages were required; it held only that a refund of unlawful taxes was one possible way for the State to satisfy the requirements of the Due Process Clause.

232 (1986). *See also Ellis v. Brotherhood of Ry. Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). The case is remanded for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-91-064 REC

CAL-ALMOND, INC., SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., AND CARLSON FARMS, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

[Filed: June 3, 1992]

ORDER AFFIRMING THE DECISION OF THE SECRETARY OF AGRICULTURE

On November 12, 1991 the court heard the cross-motions for summary judgment filed by the parties herein. More accurately, these motions constitute a review of an administrative decision.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its rulings for the reasons set forth herein.

Plaintiffs Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., and Carlson Farms have filed a first Amended Complaint for Review of Agency Action under 7 U.S.C. § 608c(15)(B), Mandamus, Declaratory Relief and Reimbursement of Assessments. By this First Amended Complaint, plaintiffs seek review by this court of the final administrative action of the Secretary of Agriculture pursuant to the Agricultural Marketing

Agreement Act of 1937 (hereinafter referred to as the AMAA), 7 U.S.C. §§ 601 et. seq.[1]

A. Standard of Review.

7 U.S.C. § 608c(15) involves petitions by handlers for modification of a marketing order or an exemption therefrom. Section 608c(15)(A) provides that the handler must first petition the Secretary of Agriculture and be given an opportunity for a hearing. "After such hearing, the Secretary shall make a ruling upon the prayer of the petition which shall be final, if in accordance with law." Section 608c(15)(B) provides for review by the appropriate district court of the Secretary's ruling. "If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

As explained in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-316 (3d Cir. 1968), cert. denied, 394 U.S. 929 (1969):

> The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a de novo fact finding process. It is limited to a determination of whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence. If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling.

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[1] On May 15, 1992, the parties stipulated to the dismissal of [*sic*] specified allegations in the First Amended Complaint pertaining to the takings claim. In addition, the parties stipulated that all allegations in the First Amended Complaint relating to the legitimacy of the reserves imposed for the crop years 1982 through 1985-1986 specified in the stipulation are dismissed with respect to Saulsbury Orchards and Almond Processing, Inc.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Where an administrative agency disagrees with the conclusions of its ALJ, the standard does not change. The ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983). The weight accorded the ALJ's findings is greatest where credibility based on witness demeanor is at issue. However, with respect to derivative inferences, the reviewing court's deference is to the agency and not to the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984); *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982). However, "[w]here . . . the agency determinations turn on purely legal questions concerning the requirements of the applicable statutes, '[t]he questions . . . are questions of law, which we *reviewed de novo*.' . . . . *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988), quoting *Lazo-Malano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).

To the extent that plaintiffs challenge the Secretary's actions under the Administrative Procedure Act, the reviewing court can set aside such agency actions, findings, and conclusions as are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(A). "To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

B. Almond Assessments Imposed from 1980 through 1990 - Violations of the Administrative Procedure Act.

Plaintiffs assert that almond assessments imposed upon them from 1980 through 1990 were imposed in violation of the Administrative Procedure Act.

1. Notice and Comment Requirements.

From 1980 to 1986, the United States Department of Agriculture (hereinafter referred to as the Department) published the final rule containing both the Secretary's approval of the Almond Board's proposed budget and the annual assessment rate without first publishing a proposed rule and inviting notice and comment within the meaning and scope of the APA.[2]

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[2] The rule making required by the APA is set forth in 5 U.S.C. § 553:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved —
>
> . . .
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
>
> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law . . . .
>
> . . .
>
> Except when notice or hearing is required by statute, this subsection does not apply —
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> . . .
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

A "rule" for purposes of the APA is defined in Section 551(4) as follows:

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe the law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

a. Discretionary.

The Department contends that the rule-making provisions of the APA do not apply at all because the Secretary's decision whether to approve the annual budget proposed by the Almond Board is entirely discretionary.

The court, however, concludes that the appropriate analysis is, as was utilized during the administrative proceeding, whether the budget approval process is exempted from the rulemaking requirement as rules of "agency organization, procedure or practice, within the meaning of 7 U.S.C. § 553(a)(2)."[3] The ALJ, citing *Batterton v. Marshall, supra,* 648 F.2d at 707-708, held that the exception for "agency organization, procedure or practice" cannot apply where the agency action affects substantial private rights and interests:

> The budget process required by the Order is not analogous to the Department's internal budget process. Significantly, the internal budgets of the Department do not involve assessments. The assessments required to be paid by handlers [have] a substantial impact upon their private rights and interests and, therefore, the handlers should have been afforded an opportunity to participate in the rulemaking process by notice and comment.

However, in reversing the ALJ on this issue, the Judicial Officer quoted extensively from his decision in *In re Wileman Bros. & Elliott, Inc. (Wileman I)* and relied upon it in ruling that the Secretary is not required to promulgate the assessments by notice-and-comment rulemaking, a reliance the court finds to be well-taken. In *Wileman I*, in the course of affirming that ALJ's decision that notice-and-comment rulemaking is not required for the Secretary's approval of any of the Nectarine and Plum Committees' expenses, the Judicial Officer ruled in pertinent part:

> I have not been convinced that budget approval by the Secretary is something that is required to be accomplished through rule making under the [AMAA]. There is no

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[3] The ALJ's Initial Decision actually makes reference to 7 U.S.C. § 553(b)(B), but this clearly is a typographical error.

requirement in that statute that the Secretary employ notice and comment for Committees' budgets[15] and any such requirement

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[15] The Secretary's right to approve the budgets of the Committees without notice and comment rulemaking is the same as his right to approve, without notice and comment rulemaking, the budgets of his other agencies, such as the Office of Administrative Law Judges, the Office of the General Counsel, the Agricultural Marketing Service, its Fruit and Vegetable Division, or its Marketing Order Administration Branch.

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would have to be forthcoming from the provisions of the [APA], or, partake of a 'taxing' function, which would be beyond the scope of the Secretary's powers. It is true that the budgets of these Committees' (and other USDA agencies whose budgets are approved by the Secretary without notice and comment rulemaking) affect payments from others, whether they be general taxpayers, fruit handlers, or recipients of some other fee-based Government service. But in all cases this ultimately is a case of Secretarial discretion in approving the expenses of the Committees which *in themselves* impose no direct financial requirements on others. The Secretary is not forbidden from seeking further public input through a Federal Register publication regarding the budget of the Committees (or any of the Secretary's agencies) and . . . has done so on some isolated occasions. Much more typically, however, he has merely announced that the budget and certain expenditures of the Committees [or other agencies] have been approved and authorized. The key legal point, however, is that there is not requirement in law that the Secretary seek notice and comment regarding such budget authorization.

b. Good Cause.

The Secretary further argues that there was good cause within the meaning of 5 U.S.C. § 553(b)(B) to dispense with notice-and-comment rulemaking with respect to the annual assessment rates. The ALJ at pp. 72-74 did not agree. However, the Judicial Officer reversed the ALJ at pp. 132-152.

The Almond Board is required to submit a budget of its anticipated expenses for the crop year beginning July 1 to the Secretary for approval on or before August 1. 7 C.F.R. § 981.80. The final rule published in the Federal Register for the crop year 1980-1981 stated that notice-and-comment rulemaking was not necessary:[4]

> It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking and postpone the effective time until 30 days after publication in the Federal Register (5 U.S.C. 553), as the order requires that the rate of assessment for a particular crop year shall apply to all assessable almonds handled from the beginning of such year which began July 1, 1980. To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expenses and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the act it is necessary to make these provisions as specified.

The Secretary bears the burden of demonstrating good cause under Section 553(b)(B). *Northern Arapahoe Tribe v. Hodel,* 808 F.2d 741, 751 (10th Cir. 1987). "The notice and comment procedures in Section 553 should be waived only when delay would do real harm. . . . The good cause exception is essentially an emergency procedure." *Buschmann v. Schweiker, 676* F.2d 352, 357 (9th Cir. 1982). As further explained in *Northern Arapahoe Tribe, id.:*

The legislative history further defines the grounds for an agency to find good cause:

> "Impracticable" means a situation in which the due and required execution of the agency functions would be

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[4] A similar statement was published with the final rules for 1981-1986. For the 1987 crop year and thereafter, the Secretary has issued proposed and final rules concerning assessments pursuant to the notice-and-comment provisions of the APA.

> unavoidably prevented by its undertaking public rule-making proceedings. "*Unnecessary*" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "*Public interest*" supplements the terms "impracticable" or "unnecessary;" it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.
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> . . . The exception should be narrowly construed because [i]t is an important safety valve to be used *where delay would do real harm*. It should not be used, howver [sic], to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them.' . . . Section 553 is designed to give affected parties an opportunity to participate in agency decisionmaking early in the process, when the agency is more likely to consider alternative ideas. . . .

Here, the Secretary argues that the opportunity for comment provided during the public meetings of the Almond Board in July makes notice-and-comment rulemaking unnecessary. The Almond Board holds open meetings in July of each year and prepares its recommendations concerning its proposed expenses and its proposed annual assessment rate. During these meetings, the Board receives comments and testimony from any interested parties. After deciding on its recommendations to be made to the Secretary, the Almond Board directly notifies each handler of the assessment rate being proposed for that year. From 1980 to 1986, the assessment rate set forth in the final rule issued by the Secretary was exactly the same as the assessment rate proposed by the Almond Board. Defendant further argues that because the Almond Board's annual harvest forecast and proposed budget both depend on crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the rule until 30 days after publication.

The court agrees with defendant that the time frame of budget proposal and determination of anticipated crop yields and expenses

cannot be readily pushed back thereby establishing good cause for non-compliance with the APA. Moreover, even were the court to conclude to the contrary, the court is persuaded by the analysis in *Riverbend Farms, Inc. v. Madigan,* 958 F.2d 1479, 1487-1488 (9th Cir. 1992), that the failure is harmless error.

c. Statutorily Required Calculation.

The court further concurs with the Judicial Officer that compliance with the notice-and-comment requirements of the APA are unnecessary because the annual assessment rate is determined by the statutorily required calculation set forth in 7 U.S.C. § 610(b)(2)(ii). Because of the mechanical nature of the calculation, it does not constitute the kind of legislative rulemaking that should be subject to notice and comment.

2. Retroactive Assessments.

During the crop years 1980 through 1990, the final rules imposing the assessments against handlers pursuant to the AMAA and the Almond Marketing Order were not published by the Secretary until some weeks following the beginning of the crop year on July 1.[5]

Plaintiffs argue that this is impermissible retroactive rulemaking within the scope of *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208-209 (1988).[6]

The court does not agree. "While *Bowen* does create a presumption of statutory construction against retroactive rulemaking, it does not establish an absolute prohibition against such rulemaking. *Bowen*, nevertheless, does send a clear signal that agencies and courts must find congressional authorization for

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[5] For the crop year 1980, the final rule was issued on August 26, 1980, for the crop year 1981, the final rule was issued on September 24, 1981. For the following crop years the final rules were issued by the Secretary on October 5, 1983, September 27, 1984, September 9, 1985, October 17, 1986, December 1, 1987, October 3, 1988, November 6, 1989, and September 6, 1990.

[6] The ALJ so ruled at pp. 74-79. The Judicial Officer reversed the ALJ at pp. 152-166.

retroactive rulemaking in the particular law they are construing." *GMC v. National Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990). Here, the court is persuaded that the requisite congressional authorization is present in 7 U.S.C. § 610(b)(2)(ii) and in the Recommended Decision issued by the Secretary in 1950 when the Almond Marketing Order was issued.

The statutory language of Section 610(b)(2)(ii) mandates that each handler's pro rata share of the Almond Board's expenses must be based on the volume of all of the commodity covered by the marketing order. The focus of the statute is on the "expenses likely to be incurred . . . during any period specified by [the Secretary]." The period specified by the Secretary is the crop year July 1 through June 30. Therefore, the statute requires a handler to share pro rata in any expenses likely to be incurred by the Almond Board during a crop year. The fact that the actual amount of the expenses and the rate of assessment are not in place by final rule on July 1 does not, in the court's judgment, make a later final rule retroactive and does not change anything in terms of what a handler is going to be required to pay.

3. Final Rules.

a. 1980-1986 Crop Years.

Plaintiffs argue that the final rules issued by the Secretary setting forth the Almond Board's budget and assessment rate for the 1980 through 1986 crop years are arbitrary and capricious and thus violative of the APA.

In so arguing, plaintiffs note that the final rule imposing the assessment rate for the crop years in question amounted to a single paragraph stating that expenses of a certain amount are authorized and fixing a certain assessment rate, less any amount credited pursuant to the advertising regulations, not to exceed two and one half cents per pound. Plaintiffs contend that the APA requires that the reason or rationale for the final rule must be set forth by the Secretary or the final rule is automatically arbitrary and capricious.

However, case law does not necessarily support such a draconian result. As explained in *Alabama Association of Insurance Agents v. Board of Governors of Federal Reserve System*,

533 F.2d 224, 236-237 (5th Cir. 1976), *modified on other grounds*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978):

> The APA provision 'does not require the agency to supply specific and detailed findings and conclusions of the kind customarily associated with formal proceedings', but this limitation does not lessen or excuse the agency's obligation to publish a statement of reasons that will be sufficiently detailed to permit judicial review.'. . . .
>
> This statutory requirement, however, has not been enforced with vigor that would, at first blush, seem indicated. Statements with no more informative content than the one before us have been held to pass muster. . . And regulations with no statement of basis and purpose at all have been upheld where the court deemed the basis and purpose obvious. . . .
>
> The rationale of these decisions is not difficult to ascertain. Courts must have an adequate basis to engage in judicial review, but, as partners with the agencies in the effectuation of Congressional will through the administrative process, they do not function to strike down agency action because of merely formal or technical flaws . . . For this reason, a court must examine not only whether an agency's promulgation of a challenged regulation complies with the procedural requirement; it must also determine whether, in light of the nature and content of the regulation and of the underlying legislation, the extraneous material which may be available to explain the basis and purpose of the agency action, and the quantum of action taken in reliance on the regulation, any procedural flaw so subverts the process of judicial review that invalidation of the regulation is warranted.

Furthermore, the court is referred by the Department to the legislative history of the Food Security Act of 1985, discussing procedural changes to the AMAA allowing the Secretary to approve reasonable requests for marketing order committees to utilize outside counsel in rulemaking proceedings where the Office of General Counsel of the Department of Agriculture lacks sufficient staff with the necessary specialized expertise and allowing each amendment to a marketing order to be voted on individually in a referendum and marketing orders to continue in effect even if one

or more of the amendments loses in the referendum. House Report No. 99-271, Part 1, which is the report of the Committee on Agriculture, states in pertinent part as follows:

> The Committee restates its support for marketing orders and agreements as set forth in the [AMAA], as amended. The Committee supports the authority conferred upon the Secretary to establish and maintain orderly marketing conditions for any agricultural commodity enumerated in Section 8c(2). This authority provides for the continuation of marketing orders to avoid unreasonable fluctuations in supplies and prices detrimental to consumers and producers when the price of a regulated commodity exceeds parity . . . .
>
> Historically, Marketing Order Administrative Committees, comprised of producer, handler, and consumer representatives appointed by the Secretary, have been instrumental in recommending regulations necessary to maintain orderly market conditions. In large measure, the Administrative Committees help to ensure that commodity supplies achieve specified quality standards in a regular flow established through marketing quotas. The Committee encourages the cooperation of the Secretary with designated Administrative Committees. To the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the [AMAA], and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of the industry in how best to market a crop.

H.R. 99-271, Part 1, p. 193, *reprinted in* 1985 U.S.C.C.A.N. 1103, 1297.

Here, the Almond Board transmitted to the Secretary the records of its deliberations, which records include the dissenting and minority viewpoints expressed at the Almond Board public meetings, to the Secretary with its recommendations concerning the proposed budgets. This belies plaintiffs' assertion that was without any information from the opponents of the Almond Board's various recommendations in the absence of public comment. Moreover, as the Department further notes, because the amount of the annual assessments are arrived at through an entirely mechanical process which is dictated by statute, the basis and purpose of the

Secretary's decision with respect to the annual assessment rate is clear from the statutory scheme. The court does not find persuasive plaintiffs' contention that the basis and purpose for the Secretary's decision is not clear because of the absence of public comment. In the court's opinion, the Secretary's actions in issuing the final rules for the years in question as worded does not violate the APA. See *Riverbend Farms, Inc. v. Madigan, supra,* 958 F.2d at 1488.

b. 1987-1990 Crop Years.

Plaintiffs further challenge the final rules issued for the 1987-1990 crop years on the ground that the Secretary did not provide any detailed analysis why the advertising assessment was necessary for the sale of the almond crop nor why compelling handlers to advertise pursuant to the regulations set forth in 7 C.F.R. § 981.441 would carry out the purpose of selling more almonds. Plaintiffs assert that the statements in the final rules for these years that the advertising assessments are necessary are conclusions entitled to no weight by this court because of the Secretary's failure to provide a detailed rationale.

Again, however, case law does not necessarily support this result. As noted above, because the basis and purpose for the rule can be determined, the rule can be upheld.

C. Creditable Advertising Assessments.

1. Regulatory Conflict with Statute.

Plaintiffs argue that the creditable advertising regulations contained in 7 C.F.R. § 981.444, captioned "Crediting for marketing promotion including paid advertising", promulgated pursuant to 7 U.S.C. § 608c(6)(I), directly conflict with the prohibition on the regulation of advertising set forth in 7 U.S.C. § 608c(10). Therefore, because an agency action must be set aside if it is in excess of statutory jurisdiction, or limitations, or short of statutory right", *Baltimore Gas and Electric Company v. Natural Resource Defense Counsel*, 462 U.S. 87, 105 (1983), plaintiffs argue that the assessments must be set aside. Plaintiffs contend that Congress, when it enacted Section 608c(6)(I), was "merely telling the Secretary that the marketing order can contain advertising and promotional concepts, handlers can be assessed to fund that

program, but if handlers desire to engage in their own advertising and promotion to sell almonds, they can receive credit for that — but without restrictions, prohibitions or regulations concerning how, in what medium, at where the advertisements are placed, or to what market the advertisements and promotions are directed."

There are two relevant statutory provisions involving advertising in the AMAA.

Section 608c(6)(I), enacted in 1970 as part of P.L. No. 91-522, 84 Stat. 1357, provides in pertinent part:

> [Marketing] orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:
>
> . . .
>
> (I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided,* that with respect to orders applicable to almonds . . ., such projects may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . .

However, Section 608c(10), enacted in 1935 as part of P.L. No. 320, 49 Stat. 750, 758, provides in pertinent part that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereof, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement."

The ALJ agreed with plaintiffs that the regulation conflicted with the statute. The ALJ, however, was reversed by the Judicial Officer.

In the court's opinion, the Judicial Officer is correct. The creditable advertising regulations do not regulate the handler's advertising but only the handler's ability to receive credit for the advertising against the assessment. In other words, the handler is otherwise free to advertise in any manner they choose.

Plaintiffs' premise that handlers are entitled to receive credit for all of their advertising expenditures is not supported by the AMAA. The AMAA itself provides undisputed authority that handlers may be assessed without providing an opportunity for a credit. Moreover, the Almond Marketing Order did not provide for an advertising credit from 1950 to 1970. Finally, when Congress provided that advertising expenditures could be credited against annual expenditures, there was no guarantee that every handler would be able to reduce his assessment by the full amount of the allowable credit.

Furthermore, the Department's interpretation of Congressional intent as expressed in the creditable advertising regulations is reasonable given that Congress was aware of the prohibition in Section 608c(10) against regulating advertising when Congress amended the AMAA to enact Section 608c(6)(I) to permit creditable advertising. As the Department contends, if the statutory prohibition on the regulation of advertising is construed to mean that no guidelines or conditions may be established for the receipt of advertising credit, Congress' intent in establishing the creditable advertising program for almonds that such credits be available only for advertisements likely to benefit the industry would be frustrated. A court must presume that Congress acts with deliberation, rather than by inadvertence, when it drafts a statute. *United States v. Motamedi*, 767 F. 1403, 1406 (9th Cir. 1985). Where two statutes are " ' "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." ' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

2. First Amendment.

The ALJ and the Judicial officer identically ruled that the creditable advertising regulations do not violate plaintiffs' First Amendment rights. The court concurs with these opinions.

The court concludes that the creditable advertising assessments do not implicate First Amendment rights because plaintiffs are not "compelled" to advertise. Section 608c(6)(I) authorizes marketing orders to provide for "production research [and] marketing research and development projects," including "projects . . . provid[ing] for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order. . . . . ." The Almond Marketing Order contains regulations, duly promulgated through formal on-the-record rulemaking, which authorize the Almond Board to establish market development projects including paid advertising, 7 C.F.R. § 981.14, to credit a portion of a handler's direct expenditures for market promotion, including paid advertising, for the sale of almonds, and to prescribe appropriate rules and regulations as are necessary to effectively regulate the crediting of the pro rata expense assessment of handlers, 7 C.F.R. § 981.41(c). The regulations do not permit plaintiffs to receive a credit against their annual assessment unless their advertising complies with the regulations regarding creditable advertising, but do not compel plaintiffs to participate in the advertising because plaintiffs are otherwise free to engage in any advertising they wish without interference with the Almond Board. As the Department argues, however, the Board is not obligated to subsidize any and all advertising that plaintiffs choose to engage in.

D. Unlawful Delegation of Judicial or Legislative Authority

Plaintiffs argue that 7 C.F.R. § 981.441, as applied, constitutes an unlawful delegation of authority because it permits the Almond Board, made up of plaintiffs' competitors, to decide what constitutes creditable advertising under the terms of the Marketing Order.

The non-delegation doctrine has its roots in the separation of powers principle underlying our tripartite system of government. "[T]he integrity and maintenance of the system of government

ordained by the Constitution" preclude Congress from delegating its legislative power to either the Executive or Judicial Branches. *Field v. Clark,* 143 U.S. 649, 692 (1892). In *Mistretta v. United States,* 468 U.S. 361, 371-373 (1989), the Supreme Court reiterated:

> We also have recognized, however, that the separation-of-powers principle, and the non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach ot [sic] such cooperative ventures: 'In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination.' . . . So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' . . . .
>
> Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under general directives . . . Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'

As noted in *National Federation of Federal Employees v. United States*, 905 F.2d 400, 404 (D.C. Cir. 1990), the "intelligible principle" [sic] test has not been a tough one. The Supreme Court has not invalidated legislation on non-delegation grounds in over fifty years. Moreover, "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." *Humphrey v. Baker,* 848 F.2d 211, (D.D. [sic] Cir.), *cert. denied*, 488 U.S. 966 (1988).

Plaintiffs refer the court to *Carter v. Carter Coal Company*, 298 U.S. 238, 311 (1938). However, as noted in *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990), the bar of delegation of "law-making" to competitors expressed in *Carter* has not been applied in modern cases. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *United States v. Frame*, 885 F.2d 1119, 1128-1129 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

The Almond Marketing Order's advertising regulations do not constitute an unconstitutional delegation under Carter or other standards articulated by the Supreme Court. The Almond Board staff makes the initial determination as to whether a proposed advertisement is creditable in accordance with regulations set forth in 7 C.F.R. § 981.441. These regulations were adopted pursuant to formal rulemaking procedures. A determination that a particular advertisement is not creditable under the regulations may be appealed to the Public Relations and Advertising Committee of the Almond Board, then to the Almond Board, and finally, to the Secretary.

Plaintiffs attempt to argue around this sequence of events by arguing that an advertisement that is approved for credit is not reviewed by the Secretary. However, this is a distinction without relevance to the issue before the court, if an advertisement has been approved for credit, it was so approved because it complied with the regulation, a regulation that was promulgated by the Secretary through the formal rulemaking process.

Plaintiffs further argue that the fact of the administrative appeal remedy is beside the point because the appeal may take many years. In so arguing, plaintiffs refer the court to *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965). *Freedman* has nothing to do with the unconstitutional delegation issue raised by plaintiffs. *Freedman* holds that a noncriminal process requiring prior submission of a film to a censor avoids violation of the First Amendment freedom of expression only with procedural safeguards designed to eliminate the dangers of censorship.

Therefore, the court concludes that the creditable advertising regulations do not constitute an unlawful delegation of authority as argued by plaintiffs. There is sufficient oversight available under the law to withstand this constitutional challenge.

E. Assessments on Reserves.

Plaintiffs argue that the ruling of the Judicial Officer that handlers may be assessed for almonds held in reserve is contrary to law.

7 U.S.C. § 610(b)(2)(ii) provides in pertinent part:

> Each [marketing] order relating to any other commodity or product [other than milk] issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, *other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order* . . . .

[Emphasis added]. 7 C.F.R. § 981-81(a) provides that a handler must pay an assessment on almonds "received by him for his own account." "Almonds received for his own account" is defined in 7 C.F.R. § 981.10 to mean "all almonds which are received by a handler (including all almonds of his own production) except those that are received by him for storage or processing for the account of any other person and with respect to which such handler performs no handling function." 7 C.F.R. § 981.50 provides in pertinent part that "[w]henever salable and reserve percentages are in effect for a crop year, each handler shall withhold from handling a quantity of almonds having a kernal weight equal to the reserve percentage of all almonds each handler receives for his own account during the crop year . . . The quantity of almonds hereby required

to be withheld from handling shall constitute, and may be referred to as the 'reserve' or 'reserve obligation' of a handler . . . ." 7 C.F.R. § 981.51 provides in pertinent part:

> Each handler may satisfy his reserve obligation with such almonds specified in the terms of the agency agreement authorized in § 981.67. . . . Any handler who does not become an agent may receive credit by similarly delivering almonds to the Board or its designees . . . .

7 C.F.R. § 981.52 provides in pertinent part that "[e]ach handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation less: (a) Any quantity which was disposed of by him pursuant to § 981-67; and (b) any quantity for which he is otherwise relieved by the Board of responsibility to so hold almonds."

Plaintiffs argue that the proper interpretation of these provisions is that the handler cannot be assessed for reserve almonds because they are not being held for the handler's account, but for the account of the Board or some other third party.

However, as defendant responds, plaintiffs are not reading the entire Almond Order in context. Thus, defendant argues:

> Before a handler can assign almonds to his reserve obligation, he must first receive them, thus activating the assessment provision . . . which requires [handlers] to then hold his reserve almonds 'for the account of the Board.' 7 C.F.R. 981.52. Therefore , the assessment is not on the almonds held for the account of the Board, but on almonds received by the handler (which may *subsequently* be held for the account of the Board).

Moreover, this is defendant's long-standing interpretation. As explained in *United States v. 313.34 Acres of Land*, 925 F.2d 698, 701 (9th Cir. 1991):

> While we recognize that 'the judiciary is the final arbiter of issues of statutory construction, an administrative agency's interpretation of a statute it is charged with administering is accorded substantial deference.' . . . We thus stress the limited

> nature of our review of the Service's interpretation of the statutory language. '[W]e should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'. . . .
>
> The interpretation given a statute by an agency need not represent the only permissible reading of the statutory language, or the 'best', reading, or the reading the court might have given the statute had the issue been considered initially in a judicial proceeding . . . Instead, the agency's interpretation of the statutory language need only be 'based on a permissible construction of the statute.' . . . To prevail, then, the Kemps must demonstrate that the Service's interpretation finds no reasonable support in the text of the Act or its legislative history.

In addition, the term "for the account of the Board" is defined differently than the term "almonds received for his own account", meaning the handler's account. Section 981.52 provides that "[u]pon demand of the Board reserve almonds shall be delivered to the Board f.o.b. handler's warehouse or point of storage, except that the Board shall not make such demand upon a handler with respect to reserve almonds for which he has agreed to undertake disposition pursuant to § 981.67." This provision means that the handlers are required to account to the Board for the disposition of the reserves, but the proceeds are those of the grower and the handler, not the Board. The proceeds of the sale of reserve almonds held for the account of a third person such as another handler belong to that handler.

Furthermore, even if the Board were to take possession of a handler's almonds and disposes of them, the Board is required by statute to "provide for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E). Therefore, as defendant contends, the handler does not sacrifice his beneficial interest in his reserve almonds when he holds them "for the account of the Board."

Finally, plaintiffs' argument is contrary to the basic purposes of the AMAA. As pointed out by defendant the Almond Order

provides that the "Board shall have power and authority to sell or dispose of any and all almond reserves . . .", 7 C.F.R. § 981.66. As contended by defendant, it is "nonsensical to suggest that Congress gave the administrative committees power over reserve pools but deprived them of any means of financing the execution of that duty."

F. Market Development/Almond Butter Program.

1. Imposition of Allocated Reserve from 1982 through 1985-1986 Crop Year.

Plaintiffs argue that the ALJ's conclusion adopted by the Judicial Officer that there was a rational basis in the rule-making record for the imposition of a reserve to be set aside by handlers in connection with the market development/almond butter program.

The proposed rule issued by the Secretary and published in the Federal Register on August 27, 1982 was based on the unanimous recommendation of the Almond Board. The final rule was published in the Federal Register following the receipt of one comment.

a. Authority to Impose Reserves.

Plaintiffs argue that relevant statutes and regulations only provide the Secretary with authority to establish reserves for "orderly marketing". Plaintiffs contend that there is no suggestion in these statutes and regulations that the Secretary can establish reserves solely for the purpose of selling agricultural products at a cheap price and for a specific end use like almond butter.

The court does not agree with plaintiffs' ultra-narrow construction of the pertinent provisions nor does the court agree with their skewed characterization of the purpose of these reserves.

The Almond Marketing Order authorizes the Secretary to designate reserves whenever he finds that such reserves "would tend to effectuate the declared policy of the [AMAA]." 7 C.F.R. § 981.47. 7 U.S.C. § 608c(6) provides that marketing orders shall contain one or more of the following terms and conditions and "no others". The terms and conditions set forth in Section 608c(6)(C)-(E) are as follows:

(C) Allotting, or providing methods for allotting, the amount of any such commodity . . . which such handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity . . . under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity . . . to be marketed in or transported to any or all markets . . . during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity . . . and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity . . . and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

7 U.S.C. § 602 sets forth the declared policy of Congress with respect to the AMAA. Section 602(l) states that it is the policy of Congress "to establish and maintain such orderly marketing conditions for agricultural commodities. . . as will establish, as the prices to farmers, parity prices . . . ." Section 602(2) states that it is also the policy of Congress "[t]o protect the interest of the consumer" by approaching the level of parity prices and by authorizing no action which has the purpose of maintaining prices for farmers above parity. Section 602(3) states that it is also the policy of Congress "to establish and maintain such production research, marketing research, and development projects provided in Section 608c(6)(I) . . . as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." Section 602(4) states that it is the policy of Congress "to establish and maintain such orderly marketing conditions. . . as will provide, in the interests of producers and consumers, an orderly flow of the

supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." Section 602(5) states that it is the policy of Congress "to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter."

As explained in *United States v. 313.34 Acres of Land*, 925 F.2d 698, 701 (9th Cir. 1991):

> While we recognize that 'the judiciary is the final arbiter of issues of statutory construction, an administrative agency's interpretation of a statute it is charged with administering is accorded substantial deference.' . . . We thus stress the limited nature of our review of the Service's interpretation of the statutory language. '[W]e should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' . . . .
>
> The interpretation given a statute by an agency need not represent the only permissible reading of the statutory language, or the best, reading, or the reading the court might have given the statute had the issue been considered initially in a judicial proceeding. . . Instead, the agency's interpretation of the statutory language need only be 'based on a permissible construction of the statute.' . . . To prevail, then, the Kemps must demonstrate that the Service's interpretation finds no reasonable support in the text of the Act or its legislative history.

In the court's opinion, plaintiffs have not carried this burden of proof. To the court, a reserve program designed to develop new markets must be included within the concept of an "orderly market". What other purpose could there be for the statutory provision for assessments for market development and product advertising? Other than referring the court to the statutes and regulations quoted above plaintiffs have presented no analysis of the

statutory definition or of any legislative history to support what the court is persuaded is an incorrect interpretation.

b. Rational Basis.

Plaintiffs further argue that there was no rational basis for the Secretary's decision to impose the reserve in order to develop the almond butter market and that, therefore, the final rule doing so was arbitrary and capricious within the meaning of the APA. In resolving' this issue, the court does not weigh the evidence before the Secretary. The court merely examines the record to see if there is evidence, which if accepted by the Secretary, supports the determination of the agency. The court is then bound by the arbitrary and capricious test. National *Soft Drink Ass v. Block,* 721 F.2d 1348, 1354 (D.C. Cir. 1983).

In arguing that the final rule was arbitrary and capricious, plaintiffs make the remarkable statement that it does not matter that for each of the years in which the Secretary approved the existence of a reserve market development program, the Secretary reviewed transcripts of meetings, minutes, reports from the Agricultural Marketing Service field agent and various other documents including resolutions, correspondence among industry members, and recommendations from handlers, all which, as well as the rules themselves, are replete with support for a reserve to help create a market for almond butter. Rather, plaintiffs rely on their argument discussed immediately above that the Secretary did not have the authority to impose the reserves for a specific use. As stated above, in the court's opinion, plaintiffs' argument is without merit.

Plaintiffs also argue that the almond butter reserve program was arbitrary and capricious because the Secretary stated in the final rule issued for the 1982 crop year that "[t]o insure success with this project, the Board believes that initially it is necessary to keep almond butter competitive with peanut butter, which currently dominates the market." The Secretary then stated:

> While the 2% reserve will limit the supply of almonds available to normal markets to a small extent it is not expected to have any effect on grower and consumer prices in 1982-83.

Plaintiffs contend:

> While the Secretary is saying, on the one hand, that almonds sold into almond butter will bring a lower price so that the almond butter can be competitive with peanut butter, the Secretary inconsistently states on the other hand that the 2% reserve for almond butter will have no affect on grower prices for that crop year. Such a statement is inconsistent (and thus arbitrary) on its face. If handlers could otherwise receive more money selling their almonds in the open market than they could selling it into almond butter, then the grower returns would be reduced by their almonds being forced into almond butter.

However, as the Department responds, the two statements by the Secretary in the final rule quoted above are not inconsistent because "[w]hile it may be true that the 2% reserve incrementally reduced 'grower returns' in the 1982-83 crop year, it is also true that a 2% reserve would not be expected to increase the prices of almonds." The "inconsistency" relied upon by plaintiffs is not relevant because the Secretary has the authority under the AMAA to impose a reserve even if prices are affected in order to maintain parity prices.

Plaintiffs further argue that "[w]hile it may be true that the Secretary has the authority to set a reserve requirement when the production exceeds the trade demand (factoring in the desirable carry over, etc.) in order to fulfill its obligations to the declared policy of congress (see 7 C.F.R. §§ 981.47 and 981.49), . . . neither the Almond Marketing Order nor the AMAA permits the Secretary to issue a reserve when it does not otherwise satisfy the reserve criteria set forth in § 981.49 and § 981.47 of the Almond Marketing Order, or satisfy the orderly marketing criteria' of the AMAA."

The point of this argument is that an Agricultural Marketing Service official stated to the Secretary in a document forwarded to the Secretary following the Almond Board's unanimous recommendation that the 2% reserve be imposed that "Obviously a 2% reserve not supply management in any sense, but such establishment is necessary to give the industry an opportunity, on a uniform basis, to develop an almond butter market." Plaintiffs flatly state that "[t]his reason alone violates the AMAA."

7 C.F.R. § 981.47 is captioned "Method of establishing salable and reserve percentages" and provides in pertinent part:

> Whenever the Secretary finds, from the recommendations and supporting information supplied by the Board or from any other available information, that to designate the percentages of almonds during any crop year which shall be salable almonds and reserve almonds would tend to effectuate the declared policy of the act, he shall designate such percentages. Except as provided in § 981.50 the salable and reserve percentages shall each be applied to the kernal weight of almonds received by a handler for his own account during the crop year. In establishing such salable and reserve percentages, the Secretary shall give consideration to the ratio of estimated trade demand (either domestic or domestic plus export, less the handler carryover available to satisfy trade demand plus the desirable handler carryover at the end of the crop year) to the estimated production of marketable almonds (all expressed in terms of kernal weight) or the allocation quantity (marketable production plus almonds diverted to oil or feed when eligible for reserve satisfaction) whichever is applicable; the recommendation submitted to him by the Board; and such other information as he deems appropriate. The total of the salable and reserve percentages established each crop year shall equal 100 percent.

7 C.F.R. § 981.49 is captioned "Board estimates and recommendations" and provides in pertinent part:

> To aid the Secretary in fixing the salable and reserve percentages, the Board shall furnish to the Secretary, not later than August 1, the following estimates (kernal weight basis) and recommendations for the crop year, each of which, or any later revisions thereof, shall be adopted by the affirmative vote of at least six members:
>
> (a) The quantity of marketable almonds to be produced;
>
> (b) The handler carryover and the reserve inventory as of July 1;
>
> (c) The desirable handler carryover and the probable reserve inventory at the end of the crop year;

(d) The trade demand, taking into consideration anticipated imports, economic conditions and the anticipated market price (within the limitations of the act);

(e) The recommended salable and reserve percentages to be established; and

(f) The recommended percentage of reserve almonds that may be exported pursuant to § 981.66.

The Board shall also furnish to the Secretary a complete report of the proceedings of the Board meeting at which the recommended salable and reserve percentages were considered. If, for any reason, the Board fails to make these estimates or to recommend to the Secretary salable and reserve percentages as required hereby, reports representing the views of members with respect to such matters may be submitted to the Secretary who may act on the basis of such reports or other information available to him.

As the Department points out, neither of these regulations impose absolute limits on the Secretary's power to establish a reserve. These regulations articulate criteria which should be considered by the Secretary in deciding whether or not to establish a reserve. However, the Secretary is fully empowered to establish reserves which do not satisfy these criteria so long as the Secretary finds "that to designate the percentages of almonds during any crop year which shall be salable and reserve almonds would tend to effectuate the declared policy of the act . . . ."

Plaintiffs further argue to some length and in some detail that the almond butter reserve requirements imposed for the years at issue were arbitrary and capricious because, according to plaintiffs' calculations, trade demand exceeded supply for each of those years.

However, as concluded by the Judicial Officer, plaintiffs' calculations of supply and demand totally omit "carryover almonds" from the previous crop year. When the carryover almonds are considered, the reserves established for 1982-1986 match the anticipated surpluses very closely. For the 1983-1984 crop year, a 3% reserve was imposed. Plaintiffs state that the establishment of this reserve for the almond butter marketing development program was arbitrary and capricious because the

Secretary did not foreclose the sale of the reserve almonds as cattle feed.

In so arguing, plaintiffs refer the court to 7 C.F.R. § 981.66(c). Section 981.66 is captioned "Conditions governing disposition of reserve." Section 981.66(a) provides that "[t]he Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable consistent with the ultimate complete disposition of reserve, subject to all conditions of this section." Section 981.66(c), captioned "exclusion from salable normal trade channels", provides:

> No reserve almonds shall be sold in the United States, Puerto Rico, and the Canal Zone other than to governmental agencies or to charitable institutions for charitable purposes, except for diversion into almond oil, almond butter, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets.

Plaintiffs have mischaracterized the final rule establishing these reserves. The final rules did not establish any specific percentages of the reserves to be allocated to almond butter or school lunch programs or any other outlets allowed by the Marketing Order. Rather, the rules establishing the reserves from 1982 to 1985-1986 provided that the reserve almonds could be sold into any noncompetitive outlet. It was the agency agreements which set forth the specific percentage limitations for the disposition of the reserve almonds.

Plaintiffs further argue that the rules establishing the reserves were contrary to law because the Secretary did not state how much of the reserves were planned to be allocated to the almond butter development program and the school lunch programs. In arguing that the proposed and final rules were required to set forth the proposed allocation, plaintiffs refer the court to the Guidelines for Fruit, Vegetable, & Specialty Crop Marketing Orders issued by the Secretary on January 25, 1982. These guidelines were issued in response to the President's Task Force on Regulatory Relief. The

court, however, is provided with no authority that the Guidelines have any force and effect at all in the resolution of the issue before the court nor with evidence of what discussions, if any, took place between the Secretary and the Almond Board. Moreover, the court does not read the Guidelines as requiring the provision of a specific percentage of allocated use.

Plaintiffs further challenge the final rules issued for the crop years on the ground that the record does not indicate, that the Secretary performed any independent analytical or judgmental functions but, rather, relied solely on the statistics supplied to him by the Board.

First of all, it is noted that eight of the nine proposals in connection with the almond butter marketing development program were approved by unanimous vote of the Almond Board. Secondly, as discussed above, case law does not support plaintiffs' strict position.

2. Special Assessments and Minimum Prices.

Whenever a reserve is established, the Board may authorize handlers to act as the Board's agents in disposing of the reserve by entering an agency agreement with the handlers. 7 C.F.R. § 981.67. Agency agreements are submitted to the Agricultural Marketing Service for review. Peggy Leong testified that because the Agricultural Marketing Service will and does call with changes to the proposed agency agreements, the absence of a call from the Agricultural Marketing Service constitutes approval of the particular agency agreement. During each of the years that the market development/almond butter program was in existence the agency agreements included provisions imposing a special assessment on those reserve almonds sold into almond butter outlets and establishing a minimum price for these almonds.

Plaintiffs contend that the Board lacked the statutory authority to include these provisions in the agency agreements. Plaintiffs further argue that these provisions are invalid because they were not submitted to notice-and-comment rulemaking pursuant to the Administrative Procedures Act.

a. Lack of Authority.

As a threshold matter, the Department takes the position that there is no issue whether the AMAA authorizes the establishment of minimum prices for almonds because of the voluntary nature of the agency agreements. Plaintiffs respond to this contention with the assertion that the contested contractual provisions are subject to the rule-making provisions of the APA, a contention non-responsive to the point being made by the Department.

Plaintiffs, referring the court to 7 U.S.C. §§ 608c(5), (6) and (7), argue that the only provision in the AMAA permitting the establishment of minimum prices pertains to milk. The statutes pertaining to fruits and vegetables do not contain such a provision.

However, plaintiffs are focusing entirely on those provisions of the AMAA setting forth the powers that may be used to regulate the market as a whole in order to produce parity prices. In this regard, it is clear that Congress contemplated that regulation of agricultural commodities other than milk would not be achieved through the setting of prices. The Almond Board, in drafting the agency agreements which contained the contested provisions, was not seeking to insure parity prices for producers and handlers but, rather, was seeking to ensure that the reserves could be entirely disposed of in future crop years. Thus, the difference in the central mechanisms used to regulate milk and other commodities is not dispositive of the issue whether the Board may establish minimum prices for reserves in order to facilitate future disposition. Furthermore, Section 981.66 of the Almond Marketing Order provides:

> The Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest price obtainable consistent with the ultimate disposition of reserve, subject to all conditions of this section.

Section 981.67 of the Almond Marketing Order further provides that a handler requesting to act as the agent of the Board shall be authorized "upon such reasonable terms and conditions, including inspection and certification requirements as the Board may require . . . ." These regulations constitute a reasonable interpretation of the Board's statutory authority. The establishment of minimum

prices for reserves in an agency agreement is a logically necessary adjunct of the Board's power over the reserve.

Plaintiffs' reply that the Department's argument ignores the Notice of Recommended Decision and Opportunity to File Written Exceptions with Respect to Proposed Marketing Agreement and Order published by the Secretary on June 8, 1950 in 15 Fed. Reg. 3623, 3636-37 is not persuasive. The language from the proposed Almond Marketing Order relied upon by plaintiffs is permissive, not mandatory. Thus, it does not preclude the interpretation forwarded by the Department.

Plaintiffs' further argument that because the "terms and conditions" provision in Section 981.67 specifically refers to inspection and certification requirements, the failure to include therein the ability to set a minimum price for reserve almonds should be construed by the court to preclude such a contractual provision is too attenuated given the broad scope of authority granted to the Board by the Almond Marketing Order to dispose of reserve almonds.

b. Requirement of Rulemaking.

Plaintiffs further argue that the Board could not include the minimum price and special assessment provisions in the agency agreements without first complying with the notice and comment requirements of 5 U.S.C. § 553.

The Department responds that the agency agreements drafted by the Board from 1982-1986 did not constitute "rules" within the meaning of the APA because handlers were not required to enter into them.

Plaintiffs respond by referring the court to *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1054 (D.C. Cir. 1987), wherein the District of Columbia Circuit held that "any contract provisions that are legislative are subject to § 553's notice and comment requirements."

The Department again insists that "the entirely optional nature of the agency agreements robs them of the defining characteristic of a legislative rule."

The court agrees with the Department. A "rule" is defined in 5 U.S.C. § 551(4) as follows:

> (4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

However, the notice and comment provisions do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice. . . ." As explained in *Stoddard Lumber Co. v. Marshall,* 627 F.2d 984, 987 (9th Cir. 1980):

> The fundamental distinction between legislative rules and interpretative rules has been described by Professor Davis in the following manner:
>
> > 'A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.'
>
> 2 K.C. Davis, *Administrative Law Treatise,* § 7:8 (2d Ed. 1979).

In *Carter v. Cleland,* 643 F.2d 1, 8 (D.C. Cir. 1980), the Court of Appeals explained:

> A substantive or legislative rule, which must conform to the APA's rulemaking procedures . . . is one that has the force of law and narrowly limits administrative discretion . . . An interpretative rule, on the other hand, is one that merely clarifies or explains an existing rule or statute.

Here, the fact that the handler can choose by executing or not executing the agency agreement negates the premise that these provisions have the force of law.

3. Extension of Deadline - Violation of APA.

7 C.F.R. § 981.66(e), captioned "Disposition after September 1", provides in pertinent part:

> Any reserve almonds remaining unsold as of September 1 shall be disposed of by the Board as soon as practicable through the most readily available reserve outlets. The date of September 1 herein specified may be extended to a later date by the Secretary, upon recommendation by the Board or other information.

On July 30, 1986, a meeting of the Almond Board was held. At that meeting, the Board voted to recommend that the Secretary extend the deadline for disposing of reserve almonds from September 1, 1986 to March 1, 1987. The report of this meeting to the Secretary from the Agricultural Marketing Service states in pertinent part:

> Chairman Walt Payne reported the recommendations and discussion of the Market Development Committee. Based upon the recommendation of the committee, the [Board] recommended that the Secretary extend the effective date for disposition of reserve almonds from September 1, 1986 to March 1, 1987. This action is authorized under section 981.66(e) and would permit the industry to dispose of about 6.6 million pounds of unsold reserve almonds over a longer period of time and so help prevent the sales from unduly depressing prices in the market. It also enables the industry to supplement the reduced 1986-87 crop supply by carrying over 6.6 million pounds from the large 1985-86 crop. The [Board] motion was made on a nine to one vote, with Cloyd Angle [president of Cal-Almond] voting in opposition. Mr. Angle, and certain others at the meeting indicated that they believed CAGE [now Blue Diamond] had taken advantage of its dominance in the industry and on the [Board] in this action. They contended that when the low crop estimate for the 1986 crop was announced in April that CAGE stopped selling reserve almonds, confident that prices would increase and that CAGE could ensure a recommendation to the Secretary to extend the deadline for the sale of those almonds. CAGE, of course, controls 6 of the 10 [Board] positions, enough for a

voting majority. There is probably some validity to both CAGE's and Cloyd Angle's explanations for the recommendation, since CAGE almost certainly realized that an extension was both obtainable and desirable to it as a business, but also it seems clear that an extension would benefit the industry as a whole by stabilizing almond supplies over the 1986-87 season.

On August 25, 1986, the Secretary published in the Federal Register the Final Rule adopting the recommendation of the Board to extend the date, stating in pertinent part as follows:

> This action is based on a recommendation of the Almond Board of California . . . and upon other available information. It is further found that this action will tend to effectuate the declared policy of the act.
>
> . . .
>
> The extension of the date for the disposition of reserve almonds to reserve outlets was recommended in view of the projected short 1986-87 almond crop. Reserve outlets include: Market development, which includes school lunch, almond butter, and complementary promotional projects; and noncompetitive outlets, such as animal feed and almonds used for crushing into oil. In particular this is the fifth year of a market development program for almond butter, in which reserve almonds have been committed to the trade. The extension of the date will allow the industry to meet its market development obligation for almond butter promotion with reserve almonds from the 1985-86 crop, rather than using almonds from the 1986-87 season. Thus, the extension would benefit the industry by stabilizing almond suppliers over the 1986-87 season.
>
> It has been determined that an emergency situation exists which warrants publication of this final rule without prior opportunity for public comment. This action will relax a restriction on handlers by allowing them additional time to sell their 1985-86 crop year reserve almonds beyond the current September 1, 1986 deadline. Therefore, this action should take effect on or before September 1, 1986 and consequently,

> there is not sufficient time to issue a notice of proposed rulemaking soliciting comments from the public.
>
> Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice of rulemaking and other public procedure with respect to this emergency action are impracticable and contrary to the public interest, and that good cause is found for making this emergency final action effective less than 30 days after publication of this document in the Federal Register.

Plaintiffs argue that this court should find, as the ALJ did, that the Secretary violated the APA because there was no emergency necessitating the issuance of the final rule without the issuance of a proposed rule and a period of public comment. The Judicial Officer ruled to the contrary.

With respect to the requirement that compliance with the APA is impracticable, it has been held that a deadline set by agency rather than Congress means that the deadline is irrelevant to the question of good cause excusing compliance with the notice and comment rulemaking provisions of the APA. *Levesque v. Block,* 723 F.2d 175, 184 (1st Cir. 1983). As explained in *United States Steel Corp. v. United States Environmental Protection Agency*, 595 F.2d 207, 213 (5th Cir. 1979):

> [T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception . . . The deadline is a factor to be considered, but the agency must still show the impracticability of affording notice and comment.

However, where time truly has been short through no fault of the agency, courts have found that the agency has carried its burden of showing good cause for not affording notice and comment. *Central Lincoln Peoples' Utility Dist. v. Johnson,* 735 F.2d 1101, 1117 (9th Cir. 1984); *Arizona State Department of Public Welfare v. Department of Health, Education and Welfare,* 449 F.2d 456, 481 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972); *National Federation of Federal Employees v. Devine*, 671 F.2d 607, 611 (D.D.C. 1982); *American Federation of Government Employees v.*

Block, 655 F.2d 1153, 1157 (D.D.C. 1981); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981).

Here, the court concludes that the process of arriving at a decision to follow the Board's recommendation is involved enough that notice and comment is not practicable, especially given that that the September 1 deadline is a pre-existing and permanent part of the Almond Marketing Order.

Irrespective of whether the court finds that there was a sufficient emergency to constitute good cause, plaintiffs further argue the APA absolutely requires that the Secretary have addressed in the final rule at issue the dissenting viewpoints to the extension of the deadline of which the Secretary was aware because of the Agricultural Marketing Service report quoted above.

However, the case upon which plaintiffs rely, *Rodway v. United States Department of Agri*culture, 514 F.2d 809, 816-817 (D.D.C. 1975), does not so hold. Moreover, the concern in that case was the absence of any administrative record for review by the court.

Finally, plaintiffs argue that the final rule extending the deadline for disposing of the reserve almonds was arbitrary and capricious. Plaintiffs argue that the Secretary never explains how disposing of the 6.6 million pounds of reserve almonds into noncompetitive outlets could have any effect on the 1986 short almond crop year nor the fact that an audit revealed evidence that reserve almonds supposedly being sold for almond butter during the prior years were actually being sold into competitive outlets.[7]

However, the court notes the evidence that because the 1986-87 almond crop was projected to be smaller than usual, extending the deadline for disposing of the 1985-86 reserve would enable the Board to have almonds available for the Reserve Market Development Program without the need for a reserve to be established for the 1986-87 crop year. Therefore, the goals of the Reserve Market

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[7] In the court's opinion, the fact and results of the audit showing noncompliance with the almond butter program is not relevant to whether the Secretary had a rational basis for extending the deadline to dispose of the reserves.

Development Program could be satisfied without depriving handlers of the ability to sell their almonds in the 1986-87 crop year.

G. Section 981.31 of the Almond Marketing Order.

7 C.F.R. § 981.31 sets forth the membership representation for the Almond Board of California.

More than 40 years after its issuance following formal notice and comment rulemaking procedures, plaintiffs assert that the adoption by the Secretary of this regulation was arbitrary and capricious because it permits a single entity, the cooperative Blue Diamond, to have six seats on the ten member Almond Board if Blue Diamond has over 50% of the tonnage for the preceding year. Blue Diamond has had six seats on the Almond Board in every year from 1950 through 1987 except 1980, 1981 and 1987. Six affirmative votes are required by the Almond Board in order for recommendations to be made to the Secretary. However, with respect to recommendations concerning advertising and promotion, seven affirmatives are required.

The court is not persuaded by plaintiffs' arguments that Section 981.31 is "arbitrary and capricious . . . in light of congress', express determination that marketing orders and marketing order regulations . . .be equitable." In the court's opinion, the record before the court demonstrates that the Secretary was considering equity when it issued the challenged portion of the Marketing Order. The court sees nothing inherently unfair or arbitrary in giving the votes on an annual basis to the groups that handle the most almonds. In fact, over time, the cooperative has not always been so.

Plaintiffs assert that Section 981.31 violates due process of law because it permits "a single entity, and more particularly a competitor, to be able to control what matters are referred to the Secretary for regulation, and which ones are prevented from going to the Secretary for regulation." However, the only case cited by plaintiffs in support of this asserted denial of due process is *Carter v. Carter Coal Company*, *supra*, 298 U.S. at 310-311. However, as held above, the court does not think that there has been an unconstitutional delegation of authority and, in any event, *Carter v. Carter Coal Company* is of doubtful validity in the present day.

Moreover, as the Department points out, in order to withstand a substantive due process challenge, a "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). Here, as noted above, there is such a rational relationship.

Moreover, it is simply not true that Section 981.31 prevents minority viewpoints from ever reaching the Secretary for consideration. In the Decision with Respect to a Proposed Marketing Agreement and Order, 15 Fed. Reg. 4272 (1950), the Secretary expressly provided that the views of the independent handlers would be considered by the Secretary in ruling on a recommendation if those views did not concur with those of the cooperative handlers.

H. Administrative Process - Denial of Due Process.

Plaintiffs further argue that the delay in the resolution of this Section 15(A) petition constitutes a denial of due process. In so arguing, plaintiffs request the court to take judicial notice of the Motion to Compel Agency Action Unlawfully Withheld or Unreasonably Delayed and the Declaration of Brian Leighton in support thereof filed in *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, No. CV-F-87-195 EDP.

Plaintiffs filed the administrative petition [which is] the subject of this action on March 2, 1987. This petition was dismissed by the ALJ on September 22, 1987 on the ground that it did not comply with rules of practice requiring specificity in pleadings. On October 26 and 27, 1987, plaintiffs filed an amended petition and an appeal of the dismissal of the initial petition. The ALJ held the amended petition in abeyance pending resolution of the appeal. On February 2, 1988, following the receipt of briefs by the parties, the Judicial Officer ruled that plaintiffs' appeal was moot because they had filed the amended petition. On May 26, 1988, plaintiffs sought interim and declaratory relief from the ALJ with respect to their challenges to the creditable advertising rules. The ALJ denied this request on June 6, 1988. Pursuant to plaintiffs' request, the ALJ

certified plaintiffs' appeal of this denial on August 18, 1988. On the same date, the ALJ placed in abeyance the Department's motion for a pre-hearing conference to simplify the issues and advance the proceeding. On October 27, 1988, the Judicial Officer dismissed plaintiffs' appeal of the denial of the request for interim and declaratory relief and denied plaintiffs' attempt to receive a ruling on the Secretary's decision. On November 18, 1988, plaintiffs filed a motion for reconsideration of the Judicial Officer's decision. The Judicial Officer denied reconsideration on January 10, 1988. On January 13, 1989, the Department filed a status report with the ALJ and renewed its motion to advance the proceedings. The parties filed a joint submission of issues to be decided on March 29, 1989. On May 8, 1989, Blue Diamond Growers, Inc. filed a motion to participate in the proceedings, which motion was granted on May 31, 1989. The ALJ conducted a hearing on the merits of plaintiffs' amended petition on June 20-21, 1989 in Sacramento. On July 11, 1989, plaintiffs moved to preclude Blue Diamond's participation, which motion was granted on August 7, 1989. The parties submitted proposed findings of fact, conclusions of law, and briefs on October 2, 1989 and January 31, 1990. Plaintiffs filed a reply brief on February 28, 1990. On April 5, 1990, the ALJ request[ed] clarifying information from the parties. Responses by the parties were filed on April 16 and 18, 1990 and plaintiffs filed a reply brief on April 27, 1990. On June 22, 1990, the ALJ issued his Decision and Order, which as noted earlier is 92 pages. On August 16, 1990, plaintiffs appealed the issues adversely decided to them and the Department did so on September 17, 1990. The case was referred to the Judicial Officer on November 6, 1990. The Judicial Officer's Tentative Decision was issued on December 11, 1990 and the final Decision was issued on January 23, 1991.

While there is no question that completion of the administrative process in connection with this Section 15(A) petition was very lengthy, it is also apparent that some of the delay directed resulted from the sheer number and magnitude of the issues raised in the petition as well as from the litigation tactics adopted by plaintiffs. In attempting to prepare for oral argument in connection with the issues raised in connection with this petition alone this court had to continue oral argument twice and had to keep this matter under submission for several months. While the court does

not mean to condone deliberate hinderances [*sic*] or bad faith, the court thinks it unrealistic of plaintiffs to expect prompt resolution of the quality and quantity of issues raised herein.

ACCORDINGLY, IT IS ORDERED that plaintiffs' Motion for Summary Judgment is denied. IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted. IT IS FURTHER ORDERED that the decision of the Secretary of the United States Department of Agriculture is affirmed in its entirety as set forth herein.

JUDGMENT FOR DEFENDANT TO BE ENTERED

Dated: June 2, 1992

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-91-123 REC

CAL-ALMOND, INC., GOURMET PACKING COMPANY, INC. AND GOLD HILLS NUT COMPANY, INC., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: June 3, 1992]

ORDER AFFIRMING THE DECISION OF THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE

On November 12, 1991, the court heard the parties' cross-motions for summary judgment. More accurately, these motions constitute an appeal from an administrative decision. Upon due consideration of the written and oral arguments of the parties, the court now enters its order affirming the decision of the Secretary of the Department of Agriculture as set forth herein.

Plaintiffs Cal-Almond, Inc., Gourmet Packing Company, Inc. and Gold Hills Nut Company, Inc. have filed a First Amended Complaint for Review of Agency Action under 7 U.S.C. § 608c(15)(B), Mandamus, Declaratory Relief and Reimbursement of Assessments. By this First Amended Complaint plaintiffs seek review by this court of the final administrative action of the Secretary of Agriculture pursuant to the Agricultural Marketing

Agreement of 1937 (hereinafter referred to as the AMAA), 7 U.S.C. §§ 601 *et seq.*[1]

A. Standard of Review

As noted above, plaintiffs seek review pursuant to 7 U.S.C. 608c(15), which involves petitions by handlers for modification of a Marketing Order or an exemption therefrom. Section 608c(15)(A) of the AMAA provides that the handler must first petition the Secretary and be given an opportunity for a hearing. "After such hearing, the Secretary shall make a ruling upon the prayer of the petition which shall be final, if in accordance with law." §608c(15)(A). Section 608c(15)(B) provides for review by the appropriate district court of the Secretary's ruling. "If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." §608c(15)(B).

The scope of review of the Secretary's administrative decision turns on whether the question at issue is one of law or fact. Questions of law are reviewed *de novo*. 5 U.S.C. 706; *Desir v. Ilchert,* 840 F.2d 723, 726 (9th Cir. 1988). Review of questions of fact requires substantial inquiry. . .a thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415 (1971). Such review includes a preliminary determination of whether or not the Secretary acted within the scope of his

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[1] On June 4, 1991, the government moved to dismiss certain allegations of plaintiffs' complaint on jurisdictional grounds, and on July 25, 1991, this court granted the government's motion with regard to: (1) plaintiffs' 5th Amendment takings argument and request for damages under the AMAA; and (2) plaintiffs' allegations concerning the 1990-91 crop year. On May 15, 1992, the parties stipulated to the dismissal of specified allegations of the First Amended Complaint pertaining to the takings claim. In addition, the parties stipulated that all allegations in the First Amended Complaint relating to the legitimacy of almond reserves for the 1988-1989 crop year specified in the stipulation are dismissed with respect to Gold Hills Nut Co., Inc.

authority. 5 U.S.C. 706(2)(C); *Overton Park,* 401 U.S. at 415. Consideration then turns to whether the act was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). "To make this finding courts must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Overton Park,* 401 U.S. at 416. In certain situations the reviewing court may be called upon to determine whether or not substantial evidence supports the Secretary's findings. 5 U.S.C. 706(2)(E); *Overton Park,* 401 U.S. at 414. Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales,* 402 U.S. 389, 401 (1971) *quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). Last, the reviewing court must inquire as to whether the Secretary's action followed necessary procedural requirements. 5 U.S.C. 706(2)(D); *Overton Park,* 401 U.S. at 417.

It should be noted that where, as here, the Secretary and the ALJ disagree the standard of review does not change. The ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency. *Stamper v. Secretary of Agriculture,* 722 F.2d 1483, 1486 (9th Cir. 1984).

Finally, it is important to keep in mind that the *desirability* of the challenged Marketing Order or of an obligation imposed thereunder is not a question before the court on review. The only question at issue here is the validity of the actions taken by defendant pursuant to the Marketing Order, the AMAA and/or the APA. *See e.g., Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 319 (3d Cir.) *cert. denied,* 394 U.S. 929 (1969).

B. Was the Final Reserve Rule Invalid as Retroactive?

In the administrative proceeding plaintiffs argued, and the ALJ agreed, that the 25% reserve rule was invalid as retroactive. The JO reversed the ALJ on this issue, and adopted verbatim the reasoning set forth in the government's petition on appeal. Specifically, the JO's adoptive decision stated,

[the] rule operates prospectively, and was not promulgated in violation of the APA or the [AMAA].

. . . This rule setting forth the *procedure* for the establishment of a reserve operates prospectively only.

. . . .

. . . No handler was legally obligated to withhold from handling a reserve percentage before a reserve percentage rule was promulgated. Therefore, neither the rule establishing the procedure for determining the reserve percentage, nor the actual rule establishing a reserve percentage, is unlawfully retroactive . . .

. . . The [AMAA] gives abundant authority to the Secretary to issue rules that maintain orderly marketing conditions, and states that it is the policy of Congress to allow the Secretary discretion to promulgate regulations to effectuate this purpose. Pursuant to this authority, the Secretary has established a scheme that will control harmful market fluctuations in the California almond industry by the restriction of the handling of almonds at certain times. Therefore, the reserve program is not in violation of the [AMAA].

Additionally, the reserve rules are not in violation of the APA . . . this rule did not alter the *past* legal consequences of past actions, and therefore it was not illegally retroactive.

. . . [T]he fact that a regulation imposes a future liability on past actions does not render it retroactive. The reserve rule does not regulate past activity. Instead, it establishes a prospective reserve requirement using all almonds handled in the crop year in the calculation. In simplest terms, no handler would be retroactively held liable for failure to maintain the 25% reserve during the 1988-89 season before the reserve requirement was made effective . . .

As established in the rulemaking proceeding establishing the reserve provisions of the Order, it is necessary for this rule to consider all almonds handled during the crop year in order to further congressional policy, and impose restrictions on all handlers equally. Thus, the reserve rule was not unlawfully

> retroactive. To the extent that it has retroactive tendencies . . . it is clearly authorized by and is not in violation of the [AMAA].

Because the JO's decision rested on a legal conclusion this court reviews the issue de novo.

Plaintiffs contend that the reserve is a classic retroactive rule because it penalizes conduct that was not unlawful at the time the conduct occurred. According to plaintiffs, Congress, in enacting the AMAA, intended for the Secretary to impose reserves for orderly marketing and supply management, but Congress did not intend for the Secretary to promulgate retroactive rules. Citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988), plaintiffs argue that absent a Congressional grant of power to promulgate retroactive rules, the reserve rule is invalid.

In *Bowen* the Supreme Court addressed the issue of retroactive rulemaking in the Medicare context. Holding a rule of the Secretary of Health and Human Services invalid as retroactive, the Bowen court determined that although the Medicare Act provides for some form of retroactive action to make corrective adjustments in reimbursements made under the Act, it does not provide the power for retroactive rulemaking. So holding, the court stated,

> [i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. In determining the validity of the Secretary's retroactive cost-limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking.
>
> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result . . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. at 208-209.

Not surprisingly, the government contends that the reserve rule is not impermissibly retroactive, and to the extent that it exhibits retroactive characteristics it is merely secondarily retroactive. A secondarily retroactive rule is defined as a one with exclusively future effect which affects[2] past transactions. *Bowen,* 488 U.S. at 219-20 (Scalia, J., concurring).[3]

The government interprets *Bowen* as permitting secondarily retroactive rules where, as here, the rule is reasonable. As the government describes it, the reserve requirement did not suddenly require that handlers have sold no more than 75% of their almond receipts. Instead, it obligated handlers to deliver to the Board, or account to the Board for, a quantity of almonds equal to 25% of the volume which they had handled that year. The rule did not require that the reserve almonds be drawn from those received during the year. Thus, even if a handler had sold all of his crop, no penalty would be imposed unless he failed to fulfill his reserve requirement on the open market.

The court agrees with plaintiffs that the reserve rule is retroactive. As Justice Scalia's trust example makes clear (*supra*, n.8), a rule is retroactive if, for example, it makes completed past conduct, such as receiving trust income without paying taxes thereon, illegal or punishable by, for example, requiring that back taxes be paid on previously received trust income. On the other hand, a rule is secondarily retroactive if it, from "X" point in time, changes the legal consequences of that same conduct, receiving

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[2] It is important to note the definitions of effect and affect. Webster's Third New International Dictionary defines effect as "something that is produced by an agent or cause . . . a resultant condition" and affect as "to produce a material influence upon or alteration in."

[3] Justice Scalia gives the following example of secondary retroactivity. The Treasury Department might decide that, for purposes of assessing future income tax liability, trust income which was previously nontaxable will be taxable. In such a situation, the tax regulation does not alter the past legal consequences of receiving trust income; back taxes are not imposed. Instead, the regulation creates a different future *effect* of receiving trust income, i.e., tax liability on the receipt of trust income in the future, and *affects the past* desirability of the trust.

trust income, if completed in the future, while affecting the past conduct, making the trust less desirable tax-wise, but without making it illegal or punishable. And, of course, a rule is not retroactive if it has no impact on past conduct.

Plugging the reserve rule into Justice Scalia's example, it is clear that the rule is fully retroactive. To avoid being penalized, the handler who sold 100% of his almonds must produce a 25% reserve, i.e., pay back taxes. The reserve cannot be said to be merely secondarily retroactive because it affects the legal consequences of past conduct in that such conduct is penalized. The reserve does not just affect the desirability of continuing that conduct in the future.

Having determined that the rule is fully retroactive the court now turns to the issue of whether or not Congress intended for the Secretary to promulgate rules retroactively. As noted, plaintiffs argue that Congress did not have such an intent. However, a careful reading of § 608c(6)(C) of the AMAA causes the court to disagree. Section 608c(6)(C) provides,

> [i]n the case of the agricultural commodities and the products thereof . . . orders issued pursuant to this section shall contain one or more of the following terms . . .
>
> (C) Allotting, or providing methods for allotting, the amount of any such commodity . . . which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, *under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product* . . . to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, *during any specified period of periods shall be equitably apportioned among all of the handlers thereof.*

(Emphasis added). Plaintiffs argue that the phrase "in such prior period as the Secretary determines to be representative" means that the Secretary may consider the amount shipped during the year to determine the reserve percentage to impose on the almonds that a handler *has available* for current shipment. According to plaintiffs, this amount cannot include almonds already shipped.

The court disagrees with plaintiffs' interpretation because it is not supported by the plain language of the statute. Section 608c(6)(C) expressly states that a reserve requirement may be based on the amount each handler has available *or* upon the amount previously shipped by each handler *or* both. It is evident that Congress intended that the Secretary be able to impose a reserve which encompasses *all* almonds handled during the crop year in question. Given the continuous manner in which almond handlers receive and ship almonds throughout the crop year, §608c(6)(C) necessarily operates retroactively to some extent. Plaintiffs have argued that *Bowen* requires Congressional intent that a reserve rule may operate retroactively to be evident from the language of the statute. The court agrees. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990) (wherein the Supreme Court, noting the tension between its statement in *Bowen* that "[r]etroactivity is not favored in the law . . . congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," and the principle set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), that a court must apply newly promulgated laws retroactively to pending cases, simply stated that under either view, "where congressional intent is clear, it governs." 494 U.S. at 853-854.). However, an explicit statement that rules promulgated pursuant to this statute may operate retroactively is not necessary in order to discern Congressional intent. Congressional intent may be evident without being expressly stated. What is important is that the intent be clear, and it is clear here.

The reasoning underlying the intent that the reserve operate retroactively is reflected in the policy of the AMAA. The declared policy of the AMAA is to establish and maintain orderly marketing conditions for agricultural commodities as will provide parity prices to farmers, protect the interests of the consumer by maintaining parity prices, establish and maintain the orderly flow of agricultural

commodities and avoid unreasonable fluctuations in supply and price, and continue for the remainder of a marketing season any regulation which tends to avoid the disruption of the orderly marketing of any commodity, provided the regulation was initiated during such marketing season on the basis of need to effectuate the aforestated policy. 7 U.S.C. 602. Section 608c(6)(C) concerns the process for defining the amount of commodity upon which the reserve will be based with the purpose of ensuring that the total quantity of such commodity to be marketed during any specified period will be equitably apportioned among all handlers. The goal of the AMAA is accomplished by allowing the Secretary to promulgate a uniform rule based on the amount of almonds each handler has currently available and/or the amounts previously handled. If the reserve obligation were imposed only on the amount of almonds currently available for shipment without regard to the amount each had previously received and shipped as plaintiffs argue, handlers would be subject to disparate, inequitable obligations. This practice would frustrate the policy of the AMAA of having the burden of maintaining parity prices apportioned equally among all handlers, and would create artificial and destabilizing market incentives on the part of handlers to receive and process almonds as early in the crop year as possible in order to avoid the reserve requirement, therefore adversely affecting the interests of the consumer in maintaining parity prices and the orderly flow of almonds.

That Congress intended the Secretary to be able to promulgate regulations at any time during the crop year and for those regulations to have an effect upon the entire crop year is further evidenced by the fact that the Secretary has the ability to release almonds held in reserve. As provided in 7 C.F.R. 981.59(a), "[u]pon any increase in the salable percentage and corresponding decrease in the reserve percentage, the reserve obligation of each handler for the entire crop year to the effective date of such action shall be computed in accordance with such revised salable and reserve percentages." In decreasing reserve percentages, the Secretary takes into account all of the almonds previously received and shipped by handlers in the same retroactive manner that the initial reserve requirement was imposed, "the restoration to the salable quantities of the respective handlers shall be pro rata on the

basis of certified kernel weight poundage of reserve contributed by said handlers *during the crop year* to the date of increase of the salable percentage . . ." 7 C.F.R. 981.59(b).

Having determined that the reserve rule is retroactive and that the AMAA allows reserve rules to operate retroactively, plaintiffs' contention that the timing of the rule was unreasonable or unduly burdensome is beside the point. Congress intended that reserve rules operate retroactively to some extent. Consequently, the Secretary's promulgation of the retroactively operating reserve rule is valid as within parameters set by Congress. While the court understands plaintiffs' frustration with this state of affairs, it is the nature of the beast, so to speak, that handlers will not conclusively know their reserve obligation, if any, until sometime after the season has begun. This court has no power to change the fundamental manner in which this system is structured. The almond marketing system was created by Congress and the route to change lies with that same governmental body. Similarly, the route to changing or terminating a marketing order lies with the Secretary, 7 U.S.C. 608c(16)(A), *Cal-Almond, Inc. v. United States Department of Agriculture*, No. 90-16343 at 3096 (9th Cir. March 30, 1992), or by a vote of the almond growers. 7 U.S.C. 608C(16)(B); *Cal-Almond, Inc.*, at 3102.

C. Was the Reserve Rule Arbitrary and Capricious?

In determining whether an act was arbitrary and capricious a reviewing court must make a searching and careful inquiry into the facts, but the ultimate standard of review is a narrow one. The court must attempt to determine the connection between the facts relied upon by the agency and the determination made.

Plaintiffs argue that the final rule issued by the Secretary setting forth the reserve requirements for the 1988-89 crop year was arbitrary and capricious and therefore in violation of the APA. The essence of plaintiffs' argument is that the time gap between the Board's recommendation of the 25% reserve rule in July, 1988, and the Secretary's issuance of the final rule in January, 1989, makes the rule arbitrary and capricious. Included within this argument is the additional contention that the final reserve rule is arbitrary and capricious because, due to the lag between the time the reserve was recommended and the time when the reserve rule

issued, the information upon which the Secretary relied in issuing the rule had become stale.

As plaintiffs point out, when the Marketing Order was instituted in 1950 the Secretary noted the desirability of having the crop year begin a sufficient time prior to the beginning of harvests in order to permit the preparation and issuance of appropriate regulations to govern the handling of the coming crop. The Secretary recommended that the crop year begin July 1st. The Secretary also recommended that the Board's recommendation be made no later than August 1st, in recognition of the fact that handlers should know the reserve percentages before active trading begins. 7 C.F.R. 981.49. Observing the importance of the considerations set forth by the Secretary in 1950, plaintiffs contend that the time lag in issuing the 1988-89 final reserve rule is necessarily arbitrary and capricious, especially since the Secretary did nothing during that time to attempt to maintain parity prices or to avoid unreasonable fluctuations in supplies.

As for the substance of the final reserve rule, plaintiffs argue that the Secretary failed to mention what facts justified the 25% reserve after the season had smoothly progressed for six months without one.

The government responds that it is industry practice to withhold for reserve the amount which the Board recommends to the Secretary, and it is this practice which caused the season's smooth progression during its first six months.[4] The "anomalous delay" in publishing the 1988-89 reserve rule did not undercut the basic assumption underlying the reserve, i.e., that it would be

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[4] Plaintiffs deny that such an industry practice exists, and argue that since the purpose of the APA is to give the public a chance to comment on proposed rules and convince the Secretary not to issue "bad" rules, handlers were not obligated to anticipate the rule that the Secretary might eventually issue. To this the government responds that, "[n]otwithstanding the concerns the Secretary may have had in 1950, the almond industry today does not suffer from any economic uncertainty in those rare instances where the reserve requirement is not formally promulgated before the most active trading begins."

issued in accordance with the Board's recommendation. As the Secretary explained upon imposition of the final rule in January, 1989, the reserve was necessary to *maintain* such orderly marketing conditions,

> If the reserve were zero and all available California almonds were sellable, almond prices, in a market which already has enough supplies on hand, would be expected to drop in both domestic and foreign markets. Thus, the Board's recommendation for a 25% reserve is designed to effectuate the purposes of the Act by avoiding unreasonable fluctuations in supplies and prices.

The government asserts that the fact that the final reserve rule did not issue until January does not diminish the logical force of the Secretary's rationale, stating,

> [t]he Secretary could not, as plaintiffs suggest, ignore the fact that the orderly marketing conditions which prevailed form the beginning of the crop year to January were only the result of almond handlers withholding surplus almonds in anticipation of a reserve requirement. The relevant industry conditions had not changed from the time that the Almond Board made its reserve recommendation — the supply of almonds still far exceeded the demand, thereby justifying a reserve requirement for that year.

The court finds the delay in issuing the reserve rule unfortunate but not arbitrary and capricious. Plaintiffs have not cited any authority for the proposition that an otherwise valid rule becomes invalid because the issuance of the rule is delayed. Furthermore, whether or not the delayed issuance of the rule was allegedly arbitrary and capricious is solely a minor, collateral matter to the much more important question of whether or not the content of the rule was arbitrary and capricious. In *Motor Veh. Mfrs. Assoc. v. State Farm Mut.*, 463 U.S. 29, 43 (1983), the Supreme Court determined that the scope of review under the arbitrary and capricious standard is basically limited to an inquiry into the reasons supporting issuance of the challenged rule. The court has read through the Secretary's statement published simultaneously with the reserve rule which addressed comments received and outlined the facts upon which the decision to impose

a reserve was based. The Secretary considered, *inter alia*, the economic impact of a reserve, the size of the crop, and the effect of a reserve on an oversupplied market, stating,

> [p]ursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.
>
> . . . .
>
> Total 1988 crop marketable production has been projected to be 556.8 million kernel weight pounds — which would be the third largest crop in history. Total 1988-89 crop year supplies (1988 crop marketable production plus marketable production carried in from the 1987-88 crop year) are projected at a record large 782.4 million kernel weight pounds — 11.3 percent larger than last year's previous record supply of 702.9 million kernel weight pounds. These projections are based on the most recent official almond crop estimate. Worldwide supplies for 1988 are also expected to be a record high. Domestic and export trade demand for 1988-89 is estimated at 530 million kernel weight pounds.
>
> . . . .
>
> While this rule may restrict the amount of almonds which handlers may sell in normal domestic export markets, the salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns . . . Also, the creation of a reserve from this year's crop may add market stability to the 1989-90 crop year by reserving 25 percent of this year's production for shipment during the 1989-90 season in the event that 1989 production is inadequate to fill that season's trade demand.

The court finds that an obvious and rational connection between the facts found by the Secretary and the choice made with regard thereto exists. This is all that the Supreme Court requires. *Motor Veh. Mfrs. Assoc.*, 463 U.S. at 43. Accordingly, the court

finds that the 1988-89 reserve rule was not arbitrary and capricious in any manner.

D. Did the Secretary Fail to Comply with the USDA's Internal Regulations by Labeling the Reserve Rule "Non-Major"?

Department Regulation 1512-1[5] (hereinafter "DR") is an internal agency regulation based on Executive Order 12,291 3 C.F.R. 133-134[6], (hereinafter "EO"). DR 1512-1 instructs the USDA to classify proposed actions as "major" or "non-major" in accordance with certain criteria contained in the EO, and which

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[5] DR 1512-1 provides in part,

1. PURPOSE

This directive is intended only to improve the internal management of the Department and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person.

2. DEFINITIONS

"Major" regulations are those which are likely to result in one or more of the following:

(1) An annual effect upon the economy of 100 million dollars or more; or

(2) A major increase in the costs or prices for consumers; individual industries; Federal, State or local government agencies; or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

[6] Section 9 of the EO provides, "[[t]his Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person . . ."

subjects "major" proposed actions to additional procedural requirements.

In the administrative proceeding, plaintiffs challenged the USDA's determination that the reserve rule was not "major" within the meaning of DR 1512-1. The JO determined that the USDA's compliance with the EO or with DR 1512-1 was not judicially reviewable, and that regardless of whether or not the agency closely follows the EO and/or DR 1512-1, the final reserve rule was not arbitrary and capricious because the USDA's assessment of the effects of the reserve rule met the requirement of reasoned, non-arbitrary decisionmaking.

As the court understands plaintiffs' argument, plaintiffs assert that the USDA, having adopted DR 1512-1, was obligated to follow it, *Service v. Dulles*, 354 U.S. 363, 389 (1957), that the reserve rule is "major" as defined within DR.1512-1[7], that it

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[7] According to plaintiffs, the price per pound of almonds between July 1988, and January 1989, was stipulated to be over $1. The 25% reserve caused approximately 140 million pounds of almonds to be withheld from the market. Thus, argue plaintiffs, the reserve rule was "major" as it had an effect on the market of over $140 million. Because the rule was "major," the USDA was obligated to follow the procedures for issuing major rules as set forth in DR 1512-1. These procedures instruct the agency to do the following: (1) review a regulatory impact analysis; (2) prepare a memorandum of law showing that the major regulation is within the authority of the agency; (3) draft alternative regulations; (4) review and clear major regulatory actions and impact analyses to assure consistency with program policy, etc.; (5) submit to evaluative review in connection with information and recordkeeping requirements.

The government disputes that the rule should have been classified as "major." The Secretary, addressed the argument set forth by plaintiffs, i.e., that the reserve would have an effect upon the economy of $100 million or more, when he issued the final rule. According to the Secretary, such an argument equates the value of the reserve,

> to lost revenue. In actual practice, the reserve does not equal lost revenue, because such a calculation does not take into account expected improved returns from the 75 percent salable portion of the crop, or the returns received from the 25 percent of the crop which will be sold to low value outlets or released to the salable category

failed to follow DR 1512-1 in issuing the reserve rule because the agency failed to classify it as "major," and that this failure constituted arbitrary and capricious conduct which renders the reserve rules invalid.

It is the government's position that a private right of action to enforce the agency's compliance with its internal regulations does not exist. The government argues that the plain language of DR 1512-1 (i.e., "this directive . . . is not intended to create *any* right or benefit, substantive or procedural, enforceable at law by a party against the United States [or] its agencies . . .") contradicts plaintiffs' interpretation, and that the DR does not provide a vehicle by which plaintiffs may challenge the reserve rule as arbitrary and capricious.

Plaintiffs contend that DR 1512-l's provision that it does not create any right or benefit enforceable by any party simply means that persons affected by the regulation cannot go to court *prior to the issuance of the final rule* and claim that the department is not following its own regulations. Upon issuance of a rule, however, the agency's action can be challenged for non-compliance with the

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later in the season. In the event that some or all of the reserve is transferred to the salable category later in the season, there would not be a reduction of revenue received for the reserve, but improved returns would be anticipated for both the reserve and the initial salable percentage of 75 percent of the 1988-89 almond crop. Therefore, this action will not have an impact of $100,000,000 on the annual economy but is designed to prevent a negative impact on the almond industry due to oversupplied markets.

Plaintiffs respond that,

> [i]f preventing the sale of 139,000,000 pounds, admittedly worth well over $100,000,000.00, will improve grower returns to the point where the grower gets more net revenue off of selling 75% of his crop than he would selling 100% of his crop, necessarily, *consumers* are expending more than an additional $100,000,000.00 for those almonds than they would otherwise have to spend without a reserve, and actually more than the value of the 139,000,000 ponds of reserve almonds (worth in excess of $150,000,000.00), and that certainly has an affect (*sic*) on the economy of in excess of $100,000,000.00.

DR. Accordingly, plaintiffs assert that they are not claiming damage awards or a private right of aetion due to the USDA's failure to follow DR 1512-1. Instead, they are asserting that the Secretary's failure to comply with the agency's internal regulations is evidence that the final reserve rule was arbitrary and capricious. *Way of Life Television Network, Inc. v. FCC,* 593 F.2d 1356 (D.C. Cir. 1979) (an "agency's failure to follow its own regulation is fatal to the deviant action").

The court agrees with the government that the USDA's compliance or non-compliance with DR 1512-1 and/or EO 12,291 is not judicially reviewable. State *of Michigan v. Thomas,* 805 F.2d 176, 187 (6th Cir. 1986), supports this conclusion. In *Thomas* the Sixth Circuit determined that the plain language of EO 12,291 evinced the "clear and unequivocal intent that agency compliance with Executive Order No. 12,291 not be subject to judicial review." Consequently, DR 1512-1, which contains the same language as EO 12,291, is not a hook upon which plaintiffs can hang their challenge to the reasonableness of the final reserve rule. Therefore, whether or not the reserve rule was arbitrary and capricious cannot be determined by looking to the USDA's compliance or noncompliance with DR 1512-1 in enacting it.

Of course, as plaintiffs argue, there are cases which state, *inter alia*, that an agency's failure to follow its internal regulations in promulgating a rule is "fatal to the deviant action." *Way of Life Television Network, supra*, 593 F.2d 1356. *See, Service v. Dulles,* 354 U.S. 363, 399 (1957); and *Simmons v. Block,* 782 F.2d 1545, 1549-50 (11th Cir. 1986). However, as the government points out, these cases are easily distinguished in that the internal regulations involved therein did not interpret an agency directive which explicitly provided for non-reviewability. Thomas, on the other hand, specifically interpreted EO 12,291 and found an unequivocal intent that agency compliance not be subject to judicial review. Accordingly, the court finds that the USDA's compliance with DR 1512-1 is not judicially reviewable and, consequently, that plaintiffs' challenge to the final reserve rule on this basis must fail. The determination of the JO as to this matter is affirmed.

E. Did the Reserve Rule Contain a Substantial Basis and Purpose?

Plaintiffs argue that the Secretary's imposition of the final reserve rule lacked a substantial basis and purpose, and list three general alleged defects with the Secretary's decision. First, plaintiffs contend that the Secretary failed to show a rational connection between the facts found and the choice made, that, in fact, the Secretary merely rubber-stamped the Board's recommendation, and that the imposition of the final reserve therefore constituted arbitrary and capricious conduct.

Second, because the Secretary allegedly failed to make the connection between the facts and his decision, plaintiffs contend that his decision was not based on an independent economic analysis of trade demand. Plaintiffs admit that the APA does not require the Secretary to conduct an economic study before imposing a final rule, but argue that if the reason for the reserve was based on economic conditions and considerations, the Secretary should have performed an economic study.

Last, plaintiffs assert that the Secretary failed to address comments submitted in opposition to the opposed rule, including those anticipating that almond demand would be higher than that contemplated by the reserve rule.

The court understands plaintiffs' position, but, having read the statement delivered by the Secretary at the time the final reserve rules issued, agrees with the government that the Secretary's decision to impose the reserve was supported by a statement of substantial basis and purpose. *National Soft Drink Assoc. v. Block*, 721 F.2d 1348, 1354 (D.C. Cir. 1983) ("We do not weigh the evidence; we merely examine the record to see if there is evidence, which if accepted by the Secretary, supports the determination of the agency.") As the government points out, the statement of basis and purpose "need not be an exhaustive, detailed account of every aspect of the rulemaking proceedings; it is not meant to be the more elaborate document, complete with findings of fact and conclusions of law, that is required in an on the-record rulemaking." *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852 (D.C. Cir.), *cert. denied. sub nom. Atlantic*

Richfield Co. v. Independent U.S. Tanker Owners Committee, 484 U.S. 819 (1987).[8]

When the Secretary issued his final rule approving a 25% reserve, he explained the basis for the imposition of the reserve stating,

> [t]otal 1988 crop marketable production has been projected to be 556.8 million kernel weight pounds — which would be the third largest crop in history. Total 1988-89 crop supplies . . . are projected at a record large 782.4 million kernel weight pounds — 11.3 percent larger than last year's. . . Worldwide supplies for 1988 are also expected to be a record high. Domestic and export trade demand for 1988-89 is estimated at 550 million kernel weight pounds . . . [T]he salable and reserve percentages are needed to lessen the impact of the projected oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. The reserve percentage is designed to reduce the oversupply situation in the industry in the 1988-89 crop year by holding off the market a percentage of the available almonds that could be added to an already fully supplied market.

Thus, the Secretary made a connection between the facts and his decision. Plaintiffs' contention that the Secretary merely rubber-stamped the Board's recommendation is not factually supported. In any event, the AMAA contemplates a close working relationship between the Secretary and the Board. *Block v. Community Nutrition Institute*, 467 U.S. 340, 346 (1984).

The Secretary also addressed comments presented in opposition to the reserve, stating,

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[8] Contrastingly, with reference to a statutory requirement which specifically obligates an agency to include in its statement of basis and purpose the methodology used in obtaining and analyzing data, the D.C. Circuit recently stated that such procedural requirements were "more stringent than those previously applicable under the Administrative Procedure Act." *Union Oil Co. v. EPA*, 821 F.2d 678, 682 (1987).

> several commenters state that the price improvement gained by the reserve would have to be quite high in order to compensate for the holding of a reserve, because these commenters equate the reserve to losing 25% of their crop. In actual practice, the 25 percent reserve is not lost to the market. Commonly, a portion of the reserve, and in some cases, the entire reserve, is released to be freely salable later in the season, as the 18 percent reserve portion of the crop was released in the 1987-88 crop year. Such releases may occur once a portion of an annual corp, has been marketed, and the danger of a seriously oversupplied market early in the marketing season, with consequent price reductions, has passed.
>
> . . .
>
> Raising a similar concern, another commenter stated that in the event that the 25 percent reserve is not released later in the season or carried over into the next year, the Board should prepare an economic analysis to be certain that the improvement in grower and handler returns due to the holding of the 25 percent reserve would be sufficient to cover the reduction in revenue represented by selling the reserve into non-competitive outlets such as almond butter, oil, donations to educational or charitable organizations, etc. The Department anticipates that the Board will review economic conditions as the season progresses and will make recommendations to release reserve almonds as they are needed.

Finally, such a study is not required by the APA. Moreover, the Secretary most definitely did take into consideration projections of the 1988-89 crop yield and market demand, both domestic and foreign, in reaching his decision that the imposition of a reserve rule was economically desirable. Furthermore, as quoted directly above, the Secretary stated that he anticipated that the Board would review economic conditions as the season progressed and make recommendation to release reserve almonds as needed.

Accordingly, the court finds that the Secretary's decision was supported by a statement of substantial basis and purpose and that such statement is sufficient to withstand plaintiffs' challenge. The determination of the JO as to this matter is affirmed.

F. Was the Assessment Rule Invalid as Retroactive?

Plaintiffs argue that the Secretary's budget and advertising assessment is invalidly retroactive as it applies to almonds received prior to the issuance of the final assessment rule. The court's decision regarding this issue can be found in its Order Affirming the Decision of the Secretary of Agriculture filed in No. CV-F-91-064-REC.

G. Do Either the AMAA or the Marketing Order Permit Assessments on Almonds Held in Reserve?

Plaintiffs contend that neither the AMAA nor the Marketing Order permit the imposition of assessments on almonds held in reserve. The court's decision regarding this issue can be found in its Order Affirming the Decision by the Secretary of Agriculture in No. CV-F-91-064-REC.

H. Do Either the AMAA or the Marketing Order Require that Reserves be Held in California?

The Almond Board has informed handlers that they may not store their reserve almonds outside of the state of California.

7 C.F.R. 981.38 grants the Board the following powers:

> (a) To administer the provisions of this part in accordance with its terms;
>
> (b) To make rules and regulations to effectuate the terms and provisions of this part;
>
> (c) *To receive, investigate and report to the Secretary complaints of violations of this part; and*
>
> (d) To recommend to the Secretary amendments to this part.

(Emphasis added).

To aid the Board in exercising its powers under § 981.38, § 981.70 provides,

> Each handler shall keep records which will clearly show the details of his receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and

> promotion activities, and other pertinent information in respect to his operations pursuant to the provisions of this part. . . *Each handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of the aforesaid records and for inspection and observation of almonds. The Board shall make such checks of almonds or audits of each handler's records as it deems appropriate or are requested by the Secretary to insure that accurate information as required in this part is being furnished by handlers.*

(Emphasis added).

In his decision, the JO determined that the foregoing sections grant the Almond Board the authority "to impose ancillary requirements which reasonably control the geographic scope of its oversight activities," and held that the Board acted reasonably and within the boundaries of its authority in requiring that reserve almonds be stored within California.

Plaintiffs make three arguments in connection with this prohibition. First, they contend that neither the AMAA nor the Marketing Order preclude a handler from storing his almonds outside of California. Since plaintiffs export the majority of their almonds, they would like to be able to store reserve almonds in areas near their final destination, i.e., Germany, so that upon release they can make quick shipment to the buyer. Plaintiffs assert that storing almonds in Germany would not be a hardship[9] or "neuter" the government's investigatory powers because "there are USDA officials all around the country, including in foreign countries[10]"

Second, plaintiffs challenge the prohibition on vagueness and due process grounds. They acknowledge that an agency's interpretive rules are entitled to deference, but argue that this

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[9] Plaintiffs offered to reimburse USDA officials for travel expenses.

[10] For example, plaintiffs point to the fact that USDA officials previously travelled to Europe to verify the fact that almonds meant to be made into almond butter were indeed being used for that purpose.

prohibition is a substantive rule, not an interpretive rule. Plaintiffs argue that this "substantive" rule derived from the AMAA is both unconstitutionally vague and, its enforcement constitutes a denial of due process because it does not give fair warning of the proscribed conduct.

Third, plaintiffs contend that this "substantive" rule was not imposed in compliance with the APA, is ultra vires, and therefore void.

The court is in complete agreement with the government's assertion that the storage restriction is an *interpretation* of the part of the Marketing Order which requires handlers to ensure that their premises are accessible to authorized representatives of the Board for observation and examination. As such, the restriction is not subject to the procedural requirements for the APA. 5 U.S.C. 553(b)(A) and (d)(2).[11]

Accordingly, the court finds that the restriction on the location of almond reserves is interpretive. The ability to restrict the place of storage for reserve almonds is a necessary adjunct to the Board's inspection, enforcement and administrative activities. The court further finds that the restriction is supported by, *inter alia*, those sections of the Marketing Order which grant the Board power to investigate violations of reserve obligations. Plaintiffs' challenge

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[11] 5 U.S.C. 553(b)(A) and (d)(2) provide,

> (b) General notice of proposed rule making shall be published in the Federal Register . . .
>
> . . . .
>
> Except when notice or hearing is required by statute, this subsection does not apply —
>
> > (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . .
>
> (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except-
>
> > (2) interpretative rules and statements of policy . . .

to that restriction therefore fails; the JO's determination as to this matter is affirmed.

I. Do Either the AMAA or the Marketing Order Prohibit Future Sales Contracts in Connection with Almonds Held in Reserve?

The USDA has stated its position that a contract for the disposition of reserve almonds entered into before the release of the reserve constitutes a sale or consignment and is therefore an act of handling within the meaning of the Marketing Order. As noted, 7 C.F.R. 981.50 prohibits the handling of reserve almonds. The USDA determined that such future sales contracts are price-depressing and detrimental to the reserve program.

In his decision, the JO made the following observations and determinations.

> Deference to agency expertise is especially appropriate when the regulations in question are components of intricate, highly technical regulatory programs, such as marketing orders. Agency interpretations of regulations implementing this type of program are to be upheld on review if they are reasonable. The AMS position on contracts for the future sale of reserve almonds meets this standard.
>
> The formation of a contract for the future sale of almonds is reasonably viewed as placing those almonds into the channels of trade. The term "sale" can reasonably be read as including future sale. Moreover, commitments for future sales of storable agricultural commodities, such as almonds, are known to have substantial intertemporal effects on prices. The existence of these economic effects strongly supports the conclusion that contracts for future sales place reserve almonds into the channels of trade.
>
> Agency action is "presumed to be based on facts justifying the specific exercise of . . . delegated authority." Petitioners have not presented any evidence sufficient to overcome this presumption favoring the Agency's position on contracts for futures sales of reserve almonds. Therefore, the Department's position should stand.

Plaintiffs set forth several arguments why the restriction on future sales contracts is invalid. As in their above argument, plaintiffs assert that this restriction is a substantive rule which was not passed in accordance with the APA. Plaintiffs also argue that the restriction would inhibit the ability of handlers and buyers to enter into contracts for the entire crop year because handlers will be unable to predict early in the season the size of a reserve, if any. Plaintiffs further assert that future sales contracts are not price-depressing. What would be price-depressing is prohibiting handlers from entering into future sales contracts and, upon release of the reserve, causing all handlers to scramble about in attempt to move their almonds at the same time. Last, plaintiffs contend that a handler does not put almonds into the channels of trade merely by entering into a future sales contract.

In response the government characterizes plaintiffs' argument as basically twofold: the restriction is invalid because the Secretary failed to follow APA promulgation procedures, and because it is unreasonable. First, the government argues that the Secretary's determination that future sales contracts for reserve almonds violates the AMAA's prohibition on the placement of such almonds into channels of commerce is interpretive and therefore deserving of substantial deference. Plaintiffs do not overcome this presumption of validity by suggesting that future sales contracts are not undesirable because year-long contracts are commonly entered into between handlers and buyers. As the government states, such a suggestion misses the point,

> [a]s plaintiffs are well aware, a contract entered into prior to the beginning of the crop year wherein a buver aerees to buy all or a percentage of what the handlers will have available for shipment during the coming cro p year does not implicate the *reserve* almonds. The future sales contracts prohibited by the Board deal specifically with the almonds that are being held in reserve. The Department interprets these contracts as acts of "handling" because there is a reasonable expectation that such future sales contracts might satisfy some of the demand that is only supposed to be satisfied by the salable percentage of almonds available for sale into competitive outlets. If futures sales contracts based on reserve almonds were allowed to satisfy some portion of the demand (including the demand for

future supplies of almonds) which exists prior to the lifting of the reserve, then the effectiveness of the reserve as a device to maintain parity prices by restricting supply would be diminished.

Second, in connection with plaintiffs' contention that upon lifting the reserve, the sudden scramble of handlers to sell the released almonds would depress prices, the government responds that there is no evidence of this supposed effect. To the contrary, because the Secretary approves a lifting of the reserve requirement only when there is evidence that demand requires that additional almonds be placed on the market, prices upon release will not be depressed.

As with the storage requirements discussed *supra*, the court finds the restriction against entering into future sales contracts interpretive and supported by, *inter alia*, those sections of the Marketing Order which prohibit the handling of reserve almonds. 7 C.F.R. 981.50. Accordingly, plaintiffs' challenge to this restriction fails and the JO's determination as to this matter is affirmed.

J. Does the Administrative Process to Which Plaintiffs were Subject Constitute a Violation of Due Process?

Plaintiffs argue that the lengthy administrative process to which they were subject without the availability of interim relief constitutes a denial of due process. The court's decision regarding this issue can be found in its Order Affirming the Decision of the Secretary of Agriculture filed in No. CV-F-91-064-REC.

ACCORDINGLY, IT IS ORDERED that plaintiffs' Motion for Summary Judgment is denied. IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted. IT IS FURTHER ORDERED that the decision of the Secretary of the United States Department of Agriculture is affirmed in its entirety as set forth hereinabove.

JUDGMENT FOR DEFENDANT TO BE ENTERED

Dated: June 2, 1992

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-91-122 REC

CAL-ALMOND, INC., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

[FILED: JUNE 3, 1992]

ORDER AFFIRMING THE DECISION OF THE SECRETARY OF AGRICULTURE

On November 12, 1991 the court heard the cross-motions for summary judgment filed by the parties herein. More accurately, these motions constitute a review of an administrative decision.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court issues its rulings for the reasons set forth herein.

Plaintiff Cal-Almond, Inc. has filed a Complaint for Review of Agency Action under 7 U.S.C. § 608c(15) (B), Mandamus, Declaratory Relief and Reimbursement of Assessments. By this complaint plaintiffs seek review by this court of the final administrative action of the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (hereinafter referred to as the AMAA), 7 U.S.C. §§ 601 *et seq.*

A. Standard of Review.

7 U.S.C. § 608c(15) involves petitions by handlers for modification of a marketing order or an exemption therefrom. Section 608c(15)(A) provides that the handler must first petition the Secretary of Agriculture and be given an opportunity for a hearing.

"After such hearing, the Secretary shall make a ruling upon the prayer of the petition which shall be final, if in accordance with law." Section 608c(15)(B) provides for review by the appropriate district court of the Secretary's ruling. "If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion the law requires."

As explained in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-316 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969):

> The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a *de novo* fact finding process. It is limited to a determination of whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence. If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Where an administrative agency disagrees with the conclusions of its ALJ, the standard does not change. The ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983). The weight accorded the ALJ's findings is greatest where credibility based on witness demeanor is at issue. However, with respect to derivative inferences, the reviewing court's deference is to the agency and not to the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984); *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982). However, "[w]here ... the agency determinations turn on purely legal questions concerning the requirements of the applicable statutes '[t]he questions ... are questions of law, which we review

de novo.' .... *Desir v. Ilchert,* 840 F.2d 723, 726 (9th Cir. 1988), quoting *Lazo-Majano v. INS,* 813 F.2d 1432, 1434 (9th Cir. 1987).

B. Creditable Advertising Assessments.

1. Regulatory Conflict with Statute.

Plaintiffs argue that the creditable advertising regulations contained in 7 C.F.R. § 981.444, captioned "Crediting for marketing promotion including paid advertising," promulgated pursuant to 7 U.S.C. § 608c(6)(I), directly conflict with the prohibition on the regulation of advertising set forth in 7 U.S.C. § 608c(10). Therefore, because an agency action must be set aside if it is in excess of statutory jurisdiction, or limitations, or short of statutory right, *Baltimore Gas and Electric Company v. Natural Resource Defense Counsel,* 462 U.S. 87, 105 (1983), plaintiffs argue that the assessments must be set aside. Plaintiffs contend that Congress, when it enacted Section 608c(6)(I), was "merely telling the Secretary that the marketing order can contain advertising and promotional concepts, handlers can be assessed to fund that program, but if handlers desire to engage in their own advertising and promotion to sell almonds, they can receive credit for that — but without restrictions, prohibitions or regulations concerning how, in what medium, at where the advertisements are placed, or to what market the advertisements and promotions are directed."

There are two relevant statutory provisions involving advertising in the AMAA.

Section 608c(6)(I), enacted in 1970 as part of P.L. No. 91-522, 84 Stat. 1357, provides in pertinent part:

> [Marketing] orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:
>
> ...
>
> (I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense

> of such projects to be paid from funds collected pursuant to the marketing order: *Provided,* that with respect to orders applicable to almonds . . ., such projects may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order. . . .

However, Section 608c(10), enacted in 1935 as part of P.L. No. 320, 49 Stat. 750, 758, provides in pertinent part that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereof, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement."

The ALJ agreed with plaintiffs that the regulation conflicted with the statute. The ALJ, however, was reversed by the Judicial Officer.

In the court's opinion, the Judicial Officer is correct. The creditable advertising regulations do not regulate the handler's advertising but only the handler's ability to receive credit for the advertising against the assessment. In other words, the handler is otherwise free to advertise in any manner they choose.

Plaintiffs' premise that handlers are entitled to receive credit for all of their advertising expenditures is not supported by the AMAA. The AMAA itself provides undisputed authority that handlers may be assessed without providing an opportunity for a credit. Moreover, the Almond Marketing Order did not provide for an advertising credit from 1950 to 1970. Finally when Congress provided that advertising expenditures could be credited against annual expenditures, there was no guarantee that every handler would be able to reduce his assessment by the full amount of the allowable credit.

Furthermore, the Department's interpretation of Congressional intent as expressed in the creditable advertising regulations is reasonable given that Congress was aware of the prohibition in Section 608c(10) against regulating advertising when Congress

amended the AMAA to enact Section 608c(6)(I) to permit creditable advertising. As the Department contends, if the statutory prohibition on the regulation of advertising is construed to mean that no guidelines or conditions may be established for the receipt of advertising credit, Congress' intent in establishing the creditable advertising program for almonds that such credits be available only for advertisements likely to benefit the industry would be frustrated. A court must presume that Congress acts with deliberation, rather than by inadvertence, when it drafts a statute. *United States v. Motamedi,* 767 F. 1403, 1406 (9th Cir. 1985). Where two statutes are "'"capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

2. First Amendment.

The ALJ and the Judicial Officer identically ruled that the creditable advertising regulations do not violate plaintiffs' First Amendment rights. The court concurs with these opinions.

The court concludes that the creditable advertising assessments do not implicate First Amendment rights because plaintiffs are not "compelled" to advertise. Section 608c(6)(I) authorizes marketing orders to provide for "production research [and] marketing research and development projects," including "projects ... provid[ing] for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . ." The Almond Marketing Order contains regulations, duly promulgated through formal on-the-record rulemaking, which authorize the Almond Board to establish market development projects including paid advertising, 7 C.F.R. § 981.14, to credit a portion of a handler's direct expenditures for market promotion, including paid advertising, for the sale of almonds, and to prescribe appropriate rules and regulations as are necessary to effectively regulate the crediting of the pro rata expense assessment of handlers, 7 C.F.R. § 981.41(c). The regulations do not permit plaintiffs to receive a credit against their annual assessment unless their advertising complies with the regulations regarding creditable advertising, but do not compel plaintiffs to participate in the

advertising because plaintiffs are otherwise free to engage in any advertising they wish without interference with the Almond Board. As the Department argues, however, the Board is not obligated to subsidize any and all advertising that plaintiffs choose to engage in.

C. Unlawful Delegation of Judicial or Legislative Authority.

Plaintiffs argue that 7 C.F.R. § 981.441, as applied, constitutes a denial of due process and an unlawful delegation of authority because it permits the Almond Board, made up of plaintiffs' competitors, to decide what constitutes creditable advertising under the terms of the Marketing Order.

The non-delegation doctrine has its roots in the separation of powers principle underlying our tripartite system of government. "[T]he integrity and maintenance of the system of government ordained by the Constitution" preclude Congress from delegating its legislative power to either the Executive or Judicial Branches. *Field v. Clark,* 143 U.S. 649, 692 (1892). In *Mistretta v. United States,* 468 U.S. 361, 371-373 (1989), the Supreme Court reiterated:

> We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach of such cooperative ventures: 'In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination.' . . . So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'
>
> . . . .

> Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under general directives . . . Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'

As noted in *National Federation of Federal Employees v. United States*, 905 F.2d 400, 404 (D.C. Cir. 1990), the "intelligible principle" test has not been a tough one. The Supreme Court has not invalidated legislation on non-delegation grounds in over fifty years. Moreover, "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." *Humphrey v. Baker*, 848 F.2d 211, 217 (D.D. Cir.), *cert. denied*, 488 U.S. 966 (1988).

Plaintiffs refer the court to *Carter v. Carter Coal Company*, 298 U.S. 238, 311 (1938). In *Carter*, the Supreme Court addressed the constitutionality of a provision of the Bituminous Coal Conservation Act of 1935. However, as noted in *Wileman Bros. v. Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990), the bar of delegation of "law-making" to competitors expressed in *Carter* has not been applied in modern cases. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *United States v. Frame*, 885 F.2d 1119, 1128-1129 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

The Almond Marketing Order's advertising regulations do not constitute an unconstitutional delegation under *Carter* or other standards articulated by the Supreme Court. The Almond Board staff makes the initial determination as to whether a proposed advertisement is creditable in accordance with regulations set forth in 7 C.F.R. § 981.441. These regulations were adopted pursuant to formal rule-making procedures. A determination that a particular advertisement is not creditable under the regulations may be

appealed to the Public Relations and Advertising Committee of the Almond Board, then to the Almond Board, and finally, to the Secretary.

Plaintiffs attempt to argue around this sequence of events by arguing that an advertisement that is approved for credit is not reviewed by the Secretary. However, this is a distinction without relevance to the issue before the court. If an advertisement has been approved for credit, it was so approved because it complied with the regulation, a regulation that was promulgated by the Secretary through the formal rulemaking process.

Plaintiffs further argue that the fact of the administrative appeal remedy is beside the point because the appeal may take many years. In so arguing, plaintiffs refer the court to *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965). *Freedman* has nothing to do with the unconstitutional delegation issue raised by plaintiffs. *Freedman* holds that a noncriminal process requiring prior submission of a film to a censor avoids violation of the First Amendment freedom of expression only with procedural safeguards designed to eliminate the dangers of censorship.

Therefore, the court concludes that the creditable advertising regulations do not constitute an unlawful delegation of authority as argued by plaintiffs. There is sufficient oversight available under the law to withstand this constitutional challenge.

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary Judgment is denied. IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted. IT IS FURTHER ORDERED that the decision of the United States Secretary of Agriculture is affirmed in its entirety as set forth herein.

JUDGMENT FOR DEFENDANT TO BE ENTERED.

Dated: June 2, 1992

/s/ ROBERT E. COYLE
ROBERT E. COYLE
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
AT FRESNO

CASE No. Cv-F-91-685 REC

CAL-ALMOND, INC., A CALIFORNIA CORPORATION; AND GOLD HILLS NUT COMPANY, INC., A CALIFORNIA CORPORATION, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

COURT ORDER GRANTING DEFENDANT'S SUMMARY JUDGMENT AND DENYING PLAINTIFFS SUMMARY JUDGMENT

Based upon the Complaint on file herein, the administrative record, the previous Decisions issued by this Court on June 3, 1992 in cases numbers CV-F-91-064, 91-122 and 91-123 REC, and based upon the stipulation of the parties hereto,

IT IS HEREBY ORDERED that summary judgment shall be entered for the Defendant, and summary judgment should be denied for the Plaintiffs, with a Judgment for the Defendant to be entered.

Dated: July 9, 1992.

/s/ ROBERT E. COYLE
Robert E. Coyle, Judge
United States District Court,
Eastern District of California

APPENDIX J

UNITED STATES DEPARTMENT OF AGRICULTURE

No. AMA Docket No. F&V 981-4

IN RE: SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., A CALIFORNIA CORPORATION; CAL-ALMOND, INC., A CALIFORNIA CORPORATION; CARLSON FARMS, A SOLE PROPRIETORSHIP

[Decision and Order filed January 23,1991]

By: DONALD A. CAMPBELL, Judicial Officer

[Syllabus Omitted in Printing]

Preliminary Statement

This is a proceeding instituted by a petition filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).[1]

On June 20, 1990, Administrative Law Judge Edwin S. Bernstein (ALJ) filed an initial Decision and Order ruling on numerous issues raised by petitioners. He held that most of petitioners' contentions were invalid, but that the Agricultural Marketing Agreement Act of 1937, the Administrative Procedure Act and/or the Marketing Order were violated as to six issues.

On August 16, 1990, petitioners appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been

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[1] See generally Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

delegated (7 C.F.R. § 2.35).[2] Petitioners appealed all but one of the issues decided adversely to the petitioners. On September 17, 1990, respondent appealed as to the six issues decided adversely to the Department. On November 6, 1990, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, I find no merit in petitioners' contentions and, therefore, I am dismissing the petition. I am adopting those portions of the ALJ's initial decision set forth below, with a few trivial changes, and with additions included within brackets, and omissions indicated by dots. Additional conclusions by the Judicial Officer follow the ALJ's initial decision. For a proper understanding of the findings, it is helpful to first read the following provisions of the Act, Order and regulations.

Provisions of the Statute

The following provisions of the Agricultural Marketing Agreement Act of 1937, as amended, set forth the statutory scheme relevant here (7 U.S.C. §§ 602(1)-(3), 608c(l)-(4), (6)(A), (6)(C), (6)(D), (6)(E), (6)(I), (7)(A), (7)(C), (7)(D), (9), (10), (12), (14), (15), (16), 608d(l), 610(b) (emphasis added)):

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices

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[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, *to establish and maintain* such production research, *marketing research, and development projects* provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title [which includes almonds], other than milk and its products, in interstate commerce *as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.*

. . . .

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, *fruits* (including filberts, *almonds*, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C. 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin).

. . .

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section [which includes almonds], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions

thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

. . . .

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including almonds] *orders* issued pursuant to this section *shall contain one or more of the following terms and conditions, and* (except as provided in subsection (7) of this section), *no others:*

(A) *Limiting*, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or *quality* thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

. . . .

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) *Determining*, or providing methods for determining, *the existence and extent of the surplus of any such commodity* or product, or of any grade, size, or quality thereof, *and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.*

(E) *Establishing* or providing for the establishment of *reserve pools of any such commodity* or product, or of any grade, size, or quality thereof, *and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.*

. . . .

(I) *Establishing* or *providing for the establishment* of production research, *marketing research and development projects designed to* assist, improve, or *promote the marketing, distribution, and consumption* or efficient production *of any such commodity or product*, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That *with respect to orders applicable to almonds, . . . such projects may provide for any form of marketing promotion including paid advertising* and with respect to *almonds*, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit *may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising* as may be authorized by the order . . . .

. . . .

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

. . . .

(C) *Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:*

(i) *To administer such order in accordance with its terms and provisions*;

(ii) *To make rules and regulations to effectuate the terms and provisions of such order;*

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

. . . .

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

. . . .

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product

thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. *No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision*

prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

. . . .

(12) Approval of cooperative association as approval of producers

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any coperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

. . . .

(14) Violation of order; penalty

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) *Any handler* subject to an order *may file a written petition* with the Secretary of Agriculture, *stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.* He shall thereupon be given an opportunity for a hearing *upon such petition*, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling *upon the prayer of such petition* which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

. . . .

§ 608d. Books and records; disclosure of information; notification of Congressional committees

(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the

purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

. . . .

§ 610. Administration

. . . .

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. *The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations setforth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.*

(2)(i) . . . .

(ii) *Each order* relating to any other commodity [i.e., other than milk] or product issued by the Secretary under this chapter *shall provide that each handler* subject thereto *shall pay to any authority or agency* established under such order *such handler's pro rata share (as approved by the Secretary) of such expenses as the*

Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. . . . The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) *Any authority or agency established under an order may maintain* in its own name, or in the name of its members, *a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses.* The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

Relevant Provisions of the Almond Order and Regulations

The following are pertinent provisions (7 C.F.R. §§ 981.10, .22, .30, .31, .38, .40, .41, .45-52, .59, .65, .66(a), (c), (e)-(g), .67, .80, .81, .441) (1989):

(Note: The provisions of the Order and Regulations are not being reproduced in Agriculture Decisions to avoid retyping.)

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Introduction

Petitioners instituted this proceeding pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 ("AMAA") (7 U.S.C. § 608c(15)(A) (1988)), by filing a Petition on March 2, 1987, which alleged that various aspects of the Marketing Order regulating the handling of Almonds Grown in

California ("Order") (7 C.F.R. Part 981) are invalid and not in accordance with law.

The Secretary of the United States Department of Agriculture ("Department") brought an enforcement action against Saulsbury Orchards and Almond Processing, Inc., ("Saulsbury"), in the District Court for the Eastern District of California on February 13, 1986, pursuant to section 8a(6) of the AMAA (7 U.S.C. § 608a(6) (1988)) to compel Saulsbury to pay its assessments. On December 18, 1986, Judge Edward Dean Price granted the government's motion for summary judgment and ordered Saulsbury to comply with the terms of the Order.

On March 2, 1987, Petitioners filed along with their Petition, an Application for Interim Relief. On September 22, 1987, Administrative Law Judge Edward H. McGrail granted Respondent's motion [to dismiss the Petition] and the Petition and Application for Interim Relief were dismissed.[3] Petitioners next filed an Amended Petition on October 16, 1987. Petitioners also filed an appeal from the decision dismissing the Petition of March 2, 1987, on October 22, 1987. On October 26, 1987, Judge McGrail ordered that the Amended Petition be held in abeyance pending a ruling by the Department's Judicial Officer, Donald A. Campbell, on the Appeal.

By Decision and Order dated February 2, 1988, the Judicial Officer advised that the Appeal was moot as Petitioners had filed an Amended Petition. The case was remanded to Judge McGrail for consideration of Petitioners' Amended Petition.

On May 26, 1988, Petitioners filed a Motion for an Order Holding Creditable Brand Advertising Assessment in an Interest-Bearing Account; or for an Order that Said Assessments will be Returned to the Petitioners if they Prevail in this Administrative Proceeding; and/or Petitioners' Application for Partial Interim Relief; and/or Petitioners' Application for a Ruling that the Secretary has Already Determined that Creditable Advertising

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[3] [The Application for Interim Relief was denied by the Judicial Officer on April 1, 1987. A second Application for Interim Relief was denied by the Judicial Officer on October 9, 1990.]

Assessments are Constitutional and no Further Exhaustion of Administrative Remedies is Required Regarding the Legality of Creditable Advertising Assessments.

This case was reassigned to the undersigned on June 17, 1988. I certified a question to the Judicial Officer asking for guidance and a ruling on Petitioners' Motion. The Judicial Officer by ruling dated October 27, 1988, found that no ruling should be made as Petitioners were seeking declaratory relief in advance of any determination as to their position on the merits.

The parties filed a Joint Submission of Issues to be Decided on March 29, 1989.

On May 8, 1989, Blue Diamond Growers, Inc. ("Blue Diamond"), filed a motion to participate in this proceeding. The motion to participate was granted on May 31, 1989, to the extent permitted by Rule of Practice 900.57 (7 C.F.R. § 900.57 (1989)).

A hearing was held on June 20-21, 1989, in Sacramento, California.

On July 11, 1989, Petitioners filed a Motion to Now Preclude Blue Diamond's Intervention in the Proceedings. By Decision and Order dated August 7, 1989, the motion was granted based upon Blue Diamond's refusal to comply with a subpoena and directions of this Administrative Law Judge in connection with the subpoena.

The parties submitted proposed findings of fact, conclusions of law, and briefs on October 2, 1989, and January 31, 1990. Petitioners filed a Reply Brief on February 28, 1990.

By Post-Hearing Order dated April 5, 1990, I requested clarifying information from the parties. Responses by the parties were filed on April 16 and 18, 1990. Petitioners filed a Reply to Respondent's Responses on April 27, 1990.

All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence. In this opinion, "Tr." refers to the transcript of the hearing. "PX" refers to the numbered exhibits offered by Petitioners. "RX" refers to the numbered exhibits offered by Respondent. "PPHF" refers to Petitioners' Post-Hearing

Findings. "RPHF" refers to Respondent's Post-Hearing Findings. "St." refers to the Stipulated Findings of the parties.

Findings of Fact

1. Petitioners, Saulsbury Orchards and Almond Processing, Inc., Cal-Almond, Inc., and Carlson Farms, are handlers as that term is defined in 7 C.F.R. § 981.13 (1989). (St. ¶¶ 3, 5, 6)

2. Cal-Almond, Inc., is an independent almond handler which was formed by Cloyd Angle in approximately 1976. (Tr. 153-54)

3. Cal-Almond, Inc., handled approximately one million pounds of almonds in 1980; approximately one million pounds in 1981; approximately 3.3 million pounds in 1982; approximately 3.3 million pounds in 1983; approximately 6.7 million pounds in 1984; approximately 6.1 million pounds in 1985; approximately 7.6 million pounds in 1986; approximately 11.6 million pounds in 1987; and approximately 10.5 million pounds in 1988. (St. ¶¶ 5, 9; RPHF)

4. In 1980, [the creditable portion of] Cal-Almond, Inc.'s . . . assessment was $26,115.00; in 1981, it was $23,895.45; in 1982, it was $83,873.88; in 1983, it was $81,859.53; in 1984, it was $167,231.05; in 1985, it was $154,938.50; in 1986, it was $190,146.07; in 1987, it was $291,333.55; and in 1988, it was approximately $265,000.00. (St.¶ 9)

5. Saulsbury is an independent handler formed in 1978. Robert M. Saulsbury is the President of Saulsbury. (Tr. 64-66)

6. Saulsbury has invested approximately $10 million into the land, the building, and the equipment of its plant in order to become a processor today. (Tr. 69)

7. In 1980, Saulsbury handled approximately 3.8 million pounds of almonds; in 1981, it handled approximately 6.6 million pounds of almonds; in 1982, it handled approximately 10 million pounds of almonds; in 1983, it handled approximately 6.8 million pounds of almonds; in 1984, it handled approximately 17.1 million pounds of almonds; in 1985, it handled approximately 9 million pounds of almonds; in 1986, it handled approximately 1.7 million

pounds of almonds; and in 1987, it handled approximately 5.8 million pounds of almonds. (St. ¶ 3)

8. [The creditable portion of] Saulsbury's . . . assessment for 1980 was $97,049.85; in 1981, it was $166,568.33; in 1982, it was $248,276.65; in 1983, it was $169,798.43; in 1984, it was $428,702.02; in 1985, it was $226,338.50; in 1986, it was approximately $40,000.00; in 1987, it was approximately $145,000.00. (St. ¶¶ 3, 8; RPHF)

9. Carlson Farms handled approximately 34,249 pounds of almonds in 1985, approximately 907,000 pounds in 1986, and approximately 202,448 pounds in 1987. (St. ¶ 6)

10. In 1985, [the creditable portion of] Carlson Farms'. . . assessment was $907.59; in 1986, [it] was $22,692.00. (St. ¶ 10)

11. The Secretary promulgated the Order in 1950, pursuant to the authority contained in the AMAA. 7 U.S.C. §§ 601 *et. seq.* (1988); 7 C.F.R. §§ 981.1-.474 (1989); 15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).

12. Section 981.31 of the Order provides for ten Almond Board of California ("Board") members to be comprised of the following: Two handlers from the cooperative, two from the independent handlers, two growers who market their almonds through the cooperative, and two growers who market their almonds through the independent handlers. There is also to be one additional handler and one additional grower associated with the entity which handled in excess of fifty percent of the California almond crop for the preceding crop year. Thus, whichever entity, the cooperative or the independent handlers and growers, handled in excess of fifty percent of the crop for the previous year will receive six seats on the Board, while the other entity will receive four. 7 C.F.R. § 981.31 (1989).

13. In each year from 1950, when the Almond Marketing Order began, through 1980, Blue Diamond, [formerly known as California Almond Growers Exchange (CAGE),] Petitioners' major competitor, has had six seats on the ten-member Board, and from 1980 to the present Blue Diamond has had six seats on the Board in every year but three, 1980, 1981, and 1987. (Tr. 216-17; St. ¶ 12)

14. [A majority vote is] required by the Board for recommendations to the Secretary, with the exception of recommendations for advertising and promotion which require seven affirmative votes. 7 C.F.R. §§ 981.40(b), (c) [,(e)] (1989).

15. The cooperative members of the Board have always voted in unison, while the members representing the independent handlers and growers have not always voted in unison. (Tr. 215-16, 219)

16. In the Recommended Decision and Decision approving the Order, the Secretary noted that there were two entities in the California almond industry, the cooperative and the independent handlers and growers, whose views of industry problems differed. The Secretary acknowledged that the cooperative handled sixty-four percent of the previous crop and as a result would immediately have six seats on the Board. The Secretary stated that a majority vote would be required by the Board to make recommendations, in accord with usual business practice. The Secretary speculated that the cooperative would tend to vote as a unit, and that the independent handlers and growers would tend to vote as a unit. As a result, the Secretary explained that if the independent handlers and growers did not agree with the cooperative's views, their views would be considered carefully by the Secretary before he reached a final decision. 15 Fed. Reg. 4272; 15 Fed. Reg. 3623, 3628, 3630 (1950).

17. The AMAA authorizes the Secretary to include order provisions, with regard to commodities other than milk, limiting the quantity which may be marketed, determining and disposing of any surplus, and establishing a reserve. 7 U.S.C. ¶¶ 608c(6)(A), (D), (E) (1988).

18. The almond crop year runs from July 1 to June 30. 7 C.F.R. § 981.19 (1989).

19. Beginning with the 1982-83 crop year, the Board proposed a five-year Almond Butter Market Development Reserve Program ("Program") to develop new markets for almonds, specifically an almond butter market. (RX 3-23) The purpose of the Program was to develop a market which would reduce future surpluses, provide additional outlets for almonds, and as a result

increase grower returns. (RX 4, 6) In addition, the Board planned to promote the use of almonds in school lunch programs. (RX 4)

20. The Order was created to stabilize the almond industry. There were high levels of production that were predicted to continue. There was evidence that indicated if current production levels continued, there would be a significant decrease in price. The Order's purpose was to provide an "adjustment of the supply of almonds to the domestic trade demand," and as a result increase grower returns. 15 Fed. Reg. 3623, 3624 (1950). With these same needs in mind, the Board recommended the Program to the Secretary to create new outlets for almonds. (RX 4, 6)

21. For the 1982-83 crop year, the Secretary imposed a two percent reserve obligation upon the handlers (RX 3, 4); for the 1983-84 crop year, a three percent reserve (PX 16; RX 22); for the 1984-85 crop year, a twenty-five percent reserve . . . (RX 35, 36: St. ¶ 15); and for the 1985-86 crop year, a twenty percent reserve. (RX 66, 67; St.¶ 16)

22. For the crop years 1984-85 and 1985-86, the Secretary issued revised reserve rules during the crop years [, lowering the reserve obligations]. (PX 19, 20, 21, 23, 24)

23. The Order provides that, when the Secretary declares a reserve, handlers must turn their reserve almonds over to the Board for disposition, or they may sell their reserve almonds acting as agents of the Board. 7 C.F.R. §§ 981.66, .67 (1989). (Tr. 326-29)

24. Section 981.66(c) of the Order specifies the outlets that handlers [or the Board] can use to dispose of their reserve almonds. 7 C.F.R. § 981.66(c) (1989).

25. When a handler acts as an agent for the Board in order to dispose of his reserve almonds, he must sign an agency agreement with the Board governing the terms and conditions for the disposition of reserve almonds. 7 C.F.R. § 981.67 (1989). (Tr. 327, 431-32)

26. If a handler signs an agency agreement and disposes of the reserve almonds, he retains the proceeds. If a handler turns his reserve almonds over to the Board, the Board sells the almonds and gives the proceeds to the handler, less any expenses incurred by the

Board. If more than one handler turns reserve almonds over to the Board, the Board pays each handler his pro rata share of the proceeds. 7 C.F.R. §§ 981.66, .67 (1989).

27. The Board sends the agency agreements to the Secretary for approval. (Tr. 432)

28. If the Secretary has any changes or questions pertaining to the agency agreements, he or a representative from the Agricultural Marketing Service ("AMS") will call or write [the Board staff]. (Tr. 442-43, 467-69)

29. The agency agreement contains minimum [required sales] prices [with regard to certain reserve outlets] and special assessments that apply to the handlers' disposition of their reserve almonds. (Tr. 331; PPHF; RPHF) These minimum [sales] prices and special assessments were not promulgated through rulemaking. (Tr. 329)

30. Reserve almonds were [required] to be diverted into "almond oil, almond butter, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds [, unless they were sold to "governmental agencies or charitable institutions for charitable purposes...."] 7 C.F.R. § 981.66(c) (1989).

31. Regarding the special assessments for reserve almonds, there was a 10¢ per pound charge on all almonds sold into almond butter or the school lunch program and that 10¢ was added on to the minimum price, which the handler had to collect from the buyer. The actual manufacturer of the butter could then receive a rebate of 10¢ per pound provided the manufacturer advertised pursuant to the Board's almond butter advertising rules. (Tr. 335-39; PPHF)

32. If a purported manufacturer of almond butter filed a verification with the Board that it was in fact making almond butter, and that manufacturer purchased quantities of almonds from handlers governed by the Order, and if that almond manufacturer was not in fact making almond butter, but was competing in normal outlets, the handler who shipped the product to that particular purported manufacturer would not have received credit for the disposition. (Tr. 450-51)

33. The Board's audits of some of the manufacturers disclosed that almonds were being sold to at least one firm representing that they were making almond butter, but in fact were not, and the Board never proceeded against the handler who sold the product to the manufacturer, or against the purported manufacturer. (Tr. 160-62, 450-51; PPHF)

34. When the Program began, Saulsbury and Cal-Almond, Inc., attempted to find an outlet for almond butter, along with many other packers, but encountered difficulty in trying to find someone willing to purchase the almonds at the minimum price. (Tr. 89-92, 160-65)

35. During the four-year Program, Saulsbury and Cal-Almond, Inc., continued to attempt to find people who would take their almonds for almond butter. (Tr. 87-88, 162-63)

36. Saulsbury was only able to export a small amount of almonds for almond butter because there were so few willing to pay the minimum price. (Tr. 87-89)

37. During the four-year Program, Saulsbury [sold] the majority of its reserve almonds [for] cattle feed at two to four cents per pound, when at the time the value of the almonds [in non-restricted outlets] was approximately $1.00-$1.10 per pound. (Tr. 89-92)

38. For the first three years of the Program, Cal-Almond, Inc., sold almost all of its reserve almonds to the feedlots because it could not find any legitimate market in almond butter. The feedlots paid approximately five cents per pound. (Tr. 162-63, 168-70)

39. The Program cost Saulsbury and its growers $2-$2.5 million, of which Saulsbury lost between $600,000.00 and $700,000.00 in profit. (Tr. 103-04)[4]

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[4] [This does not, of course, take into consideration the price levels for almonds that would have prevailed in the absence of the marketing order program.]

40. Cal-Almond, Inc., lost a considerable amount of money during the Program.[5] Because it could not find an outlet for almonds at the minimum price, it had to sell almonds to the feedlot for approximately five cents a pound, and in 1984 alone it had to dump approximately 300,000 pounds of almonds into cattle feed. (Tr. 168-70).

41. The Order provides that the time to dispose of any reserve almonds may be extended beyond September 1 [of the following crop year] upon recommendation by the Board or other information. 7 C.F.R. § 981.66(e) (1989).

42. The 1986 crop year resulted in an extremely short crop. Handlers were required to dispose of their 1985 reserve almonds by September 1, 1986. Before the spring of 1986 the market for almonds was approximately $1.10-$1.20 per pound, but Blue Diamond knew in the spring of 1986 that the price for almonds would escalate dramatically because of the 1986 short-crop year, and as a result Blue Diamond bloc-voted at the July 1986, Board meeting to extend the deadline for disposition of the reserve almonds from September 1, 1986, to March 1, 1987. (PX 39, 62, 63; RX 75; Tr. 105-07, 111-12, 170-76) [The vote on recommending an extension was 9 to 1 (PX 62, pp. 5-6).]

43. The Secretary extended the date for the disposition of the 1985-86 reserve from September 1, 1986, until March 1, 1987. The Secretary found that the extension would benefit the industry as a whole by, in part, permitting the reserve from the 1985-86 crop year to be used in the next year. The next year was to have been the fifth year of the five year plan and by issuing the extension, the Secretary was able to avoid issuing a reserve for the 1986-87 crop year. (PX 25)

44. The Secretary did not allow notice and comment on the rule issued on or about August 20, 1986, extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987. (PX 25)

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[5] [See note 4, *supra*.]

45. Petitioners, and many other independent almond handlers, had already made commitments to ship their almond reserves pursuant to the previous rules set by the Board, which mandated a disposition by September 1, 1986. Of the 6.6 million pounds of almonds remaining uncommitted for the reserve program on July 30, 1986, Blue Diamond had 4.7 million pounds. (PX 63; Tr. 105-07, 111-12, 170-76, 332-33)

46. Each crop year the Board is required to recommend a budget to the Secretary encompassing the Board's expenses. 7 C.F.R. § 981.80 (1989).

47. The . . . assessment rate [charged handlers on their receipts of almonds] is determined by dividing the pounds of almonds in the crop estimate into the Board's projected expenses. 7 C.F.R. § 981.81 (1989).

48. Since 1980, the Secretary has set a 2.5¢ per pound creditable advertising assessment [rate] for each crop year [, i.e., the amount that the handler can be credited with for his direct expenditures for marketing promotion including paid advertising. The assessment rate each year was slightly higher, usually about 2.8¢ per pound.] (RX 94, 96, 103, 106, 110, 115, 119, 125, 126, 132, 133, 136, 137)

49. The assessment regulation is normally enacted with a retroactive effective date. (Respondent's Brief, p.77)

50. The Secretary did not allow notice and comment on the annual rules from 1980-86, establishing the [assessment rate and the] creditable [advertising] assessment rate. (RX 94, 96, 103, 106, 110, 115, 119)

51. A handler must pay the . . . assessment directly to the Board, or he may advertise pursuant to section 981.441 of the Order and receive credit [up to the amount of the creditable advertising assessment rate] toward his . . . assessment amount. 7 C.F.R. §§ 981.41, .441 (1989). (Tr. 237)

52. Section 981.441 of the Order establishes the standard for crediting for marketing promotion, including paid advertising. If a handler advertises and wants to receive credit toward his assessment, he must submit a claim form to the Board. On the

claim form, the handler must demonstrate that payment was made for the advertisement, and the cost was consistent with the "standard rate" for the particular advertising medium. 7 C.F.R. § 981.441 (1989). (Tr. 237-38)

53. The Board is not concerned with the cost of the advertisement provided that the expense is within the standard rate card, the standard media expense. (Tr. 239)

54. Under the rules, the handlers have a certain amount of time in which to [engage in marketing promotion including paid advertising, and file documentation with the Board, in order to receive credit for his marketing promotion expenditures.] 7 C.F.R. § 981.441 (1989). (Tr. 234-35)

55. The Board staff makes the initial decision as to whether an advertisement is creditable. (Tr. 299, 309-10) If the advertisement is approved, the handler receives credit and the process ends. If the advertisement is not deemed creditable, the handler may appeal to the Public Relations and Advertising Committee. (Tr. 299, 309) If the Committee denies credit, the handler may appeal to the Board. (Tr. 302) If the Board denies credit, the handler may appeal to the Secretary. (Tr. 310)

56. The Board staff checks an advertisement's content to determine whether it should be deemed creditable. (Tr. 240, 305)

57. There are currently six members on the Public Relations and Advertising Committee, three of whom are associated with Blue Diamond. The staff of the Board has denied credit in the past to an advertisement placed by Blue Diamond. When a vote was taken by the Public Relations and Advertising Committee as to whether or not the advertisement should receive credit, Blue Diamond was permitted to vote on whether its own advertisement should receive credit. (Tr. 298-302)

58. The Board staff has rejected numerous advertisements for credit, which have been submitted by handlers. (PX 103, 106, 132, 138; Tr. 311-12)

59. The Board has developed an advertising manual, with advertising guidelines, to help clarify to handlers the requirements

of section 981.441, and to assist handlers to advertise within the guidelines. (PX 71; Tr. 316-17)

60. It appears that the majority of all almonds sold by handlers are sold to companies for ingredient manufacturing. (Tr. 346)

61. Pursuant to section 981.441, one allowable form of advertising for credit is an advertisement of almonds in conjunction with a complementary product. However, neither the rules nor the Board has a definition of what is a "complementary product," and Peggy Leong's best definition of this is something that does not "disparage almonds." However, Ms. Leong [(the Board manager)] did not believe one could receive credit for an advertisement of almonds alongside a battleship. (Tr. 463-64)

62. A handler cannot receive credit for taking out an advertisement directing consumers to a particular store unless the handler owns that retail outlet. (Tr. 465)

63. Most of the advertisements submitted by handlers for credit have been advertisements placed in the domestic market, but since 1980, 55% to 65% of all almonds were exported. (Tr. 345-46)

64. Almost all advertising done by handlers is domestic advertising, but the domestic sales have not increased to the same ratio that the foreign sales have increased. Thus, advertising by handlers like Cal-Almond has not been very productive [, according to Cal-Almond's owner]. (Tr. 18183) [However, Dr. John Baritelle, Agricultural Economist, University of California at Riverside, conducted a study of the returns from almond advertising under the California Almond Order in the domestic market, showing that the returns to the industry from almond advertising substantially exceeded the expenditures. (RX 69, Minutes of the Almond Board of California Marketing Policy Meeting, July 25, 1985, at 920).]

65. From 1980 to 1983, Saulsbury attempted to sell almonds on the grocery store shelves but found it impossible to enter that market because it was dominated by Blue Diamond, Planters, Fisher Nuts, and Azar Nuts. (Tr. 69-71)

66. Fisher, Planters and Azar Nuts are rebaggers, and are not regulated by the Almond Marketing Order, but Saulsbury's chief competition in the supermarket business is Blue Diamond. (Tr. 72; RPHF)

67. Blue Diamond sells 92% of the almonds sold in grocery stores and sells 95 out of every 100 cases of snack almonds. (PX 65, 68; Tr. 73-74)

68. Between 1984 and 1987, Saulsbury exported approximately sixty percent of its almonds to ingredient users, and the forty percent that it shipped domestically went to ingredient users for candy, ice cream, cereal and for mixed nuts. (Tr. 75-76; RPHF)

69. From 1980 to 1984, Saulsbury attempted to advertise within the guidelines of section 981.441, but since it could not compete on the store shelf with Blue Diamond, it was genuinely restricted [insofar as it was seeking to receive credit for its advertisements] because of the advertising rules, and thus advertised for a mail order business. (Tr. 77-78)

70. For every dollar Saulsbury spent in advertising within the Board's rules and regulations, it returned less than fifty cents. For example, in 1982, Saulsbury spent approximately $248,276.65 in creditable advertising assessments and its gross mail order sales were between $30,000.00 and $40,000.00, and it cost twice as much to operate the mail order business than was actually received. (Tr. 78-80)

71. Saulsbury experimented with various publications and employed a full time person to investigate how to best receive a return on its advertising dollar, and within the framework of the advertising rules. Saulsbury could not find any permissible forms of advertising that would return an investment on its dollar since most of its sales were to cereal companies and it could not receive credit for advertising those cereals. (Tr. 80-82)

72. On one occasion, Saulsbury found a chain of mini-markets in the Boise, Idaho, area to carry its almonds. Saulsbury took out an advertisement directing consumers to that particular store, and was denied credit for the advertisement [because under the regulations, advertisements "which direct consumers to one or more

named retail outlets, other than handler operated, shall not be eligible for credit" (7 C.F.R. § 981.441(c)(5)(iii)).] Saulsbury has no stores of its own. (PX 72; Tr. 82-83)

73. Saulsbury purchased charitable packages of almonds from the Board to give away to charity for credit toward its advertising assessments, but those did not increase Saulsbury's other sales. (Tr. 84-85)

74. Only four to five percent of all almonds produced in California are sold on grocery store shelves as almonds, as opposed to ingredient items. (Tr. 120)

75. Since 1980, Cal-Almond, Inc., could not find any form of advertising permitted under the rules that assisted Cal-Almond in the sale of its almonds. Cal-Almond exports approximately 90% of its almonds as ingredient items, and its domestic sales are for ice cream. (Tr. 176-78)

76. Cal-Almond does not sell almonds on grocery store shelves because it has been unable to compete with Blue Diamond in that market. (Tr. 178)

77. Cal-Almond spends its 2.5¢ per pound advertising on its mail order business, and advertises in some of the best magazines in the United States. (Tr. 178-79)

78. Cal-Almond loses a substantial amount of money on its mail order business. Cal-Almond's gross mail order sales in 1983 were $3,962.19, but it spent $81,085.53 in mail order advertising. In 1984, [the creditable portion of] Cal-Almond's . . . assessment was $167,231.05, and its gross mail order sales were $40,486.33. In 1985, [the creditable portion of] Cal-Almond's assessment was $154,938.50 and its gross mail order sales were $58,357.00. In 1986, [the creditable portion of] Cal-Almond's assessment was $190,146.07, but its gross mail order sales were $76,210.25. In 1987, [the creditable portion of] Cal-Almond's assessment was $291,333.55 but its gross mail order sales were $85,062.11. In 1988, [the creditable portion of] Cal-Almond's . . . assessment was [approximately] $265,000.00, but its gross mail order sales were only $121,075.45. All of Cal-Almond's [advertising money was] spent on mail order advertising. (Tr. 395-99)

79. As a result of the failure of Cal-Almond's advertising program, it hired a new advertising firm to find additional ways to advertise. Cal-Almond drafted an advertisement for the *Wall Street Journal*, to increase its sales. The advertisement would cost slightly more than $20,000.00. Cal-Almond, Inc., submitted the proposed advertisement to the Board for approval and was denied credit for the advertisement by the Board. (Tr. 399-401; PX 138)

80. Cal-Almond submitted another type of advertisement to the Board for incurred costs for the advertisement. However, the Board denied credit to Cal-Almond for its advertisement. (Tr. 402-04; PX 103)

81. Although Cal-Almond has its company name on its almond boxes, unlike Blue Diamond, Cal-Almond does not have a brand name [that is used on grocery shelves]. (Tr. 406-07)

82. The Board's promotion and advertising activities have been ideologically neutral. (Tr. 431)

83. Whenever the Secretary establishes a reserve, handlers must put into reserve the set percentage of almonds received for their own account during the crop year. 7 C.F.R. § 981.50 (1989).

84. Pursuant to section 981.81(a) of the Order, handlers must pay assessments on almonds received for their own account. 9 C.F.R. § 981.81(a) (1989).

85. Section 981.10 of the Order defines almonds held for the account of the handler to include all almonds received by the handler, including all almonds of his own production. 7 C.F.R. § 981.10 (1989).

86. The Secretary retains the authority to disapprove Board actions at any time. 7 C.F.R. § 981.40(d) (1989).

CONCLUSIONS OF LAW

1. Section 981.31 of the Order is in accordance with law. It is not arbitrary and capricious for the cooperative to hold six seats on the Board, while the independent handlers hold four. The AMAA was designed to benefit cooperatives, and it is not a violation for the cooperative members to bloc vote. *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 202-05 (1988), *aff'd in part and*

remanded sub nom. Riverbend Farms, Inc. v. Yeutter, No. CV F-88-89 EDP (E.D. Cal. June 14, 1989), *appeal docketed,* No. 90-15505 (9th Cir. Apr. 24, 1990), No. 90-15781 (9th Cir. June 11, 1990); 7 C.F.R. § 981.31 (1989).

2. Section 981.31 of the Order does not violate section 8c(6) of the AMAA, as this section is inapplicable to the composition of the Board. Further, section 981.31 of the Order is equitable. *Sequoia Orange*, 47 Agric. Dec. 2; 7 U.S.C. § 608c(6) (1988); 15 Fed. Reg. 4272, 15 Fed. Reg. 3623 (1950).

3. Section 981.31 of the Order is not an unlawful delegation of authority by the Secretary. *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989), *cert. denied*, _____ U.S. ____ [110] S. Ct. 1168 (1990); *Chiglades Farm, Ltd.* v. *Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); *Sequoia Orange*, 47 Agric. Dec. at 180-85. The Secretary has retained all of the enforcement and implementation authority under the Order. The Secretary has the final approval of all Board actions. 7 C.F.R. § 981.40(d) (1989).

4. Section 981.31 of the Order does not violate Petitioners' right to due process and equal protection under the law. There is a rational basis for the composition of the Board. *City of Dallas* v. *Stanglin*, 490 U.S. [19], 109 S. Ct. 1591, 1594 (1989); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); 15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).

5. Section 981.31 of the Order does not violate section 8c(7)(A) of the AMAA. The language in section 8c(7)(A) is permissive and thus, section 8c(7)(A) is not a required element for all marketing orders. 7 U.S.C. § 608c(7)(A) (1988).

6. Petitioners fail to meet their burden of proof, and thus section 8d(1) of the AMAA is not rendered moot by section 981.31 of the Order. 7 U.S.C. § 608d(l) (1988).

7. There was a rational basis in the rulemaking record for the establishment of the Program. (1982-83 crop year: PX 34, 36; RX 3, 4, 5, 6, 7, 15. 1983-84 crop year: PX 16, 41, 42; RX 18, 22, 24, 28. 1984-85 crop year: PX 46, 47, 48; RX 31, 35, 36, 37, 39, 40, 55; revisions: PX 19, 20, 21; RX 41, 44, 45, 46, 48, 49,

50, 52, 53, 59, 60. 1985-86 crop year: RX 56, 66, 67, 68, 69, 79, 80, 90; revisions: PX 23, 24, 61; RX 71, 72, 73, 77, 78)

8. . . .

9. There was no unlawful delegation of authority by the Secretary to the Board as to the Program. The Board only recommended the amount of the reserve to be allocated to the Program. The Secretary approved . . . the salable and reserve percentages. (Tr. 459-61)

10. . . . .

11. The process whereby the Secretary, by way of AMS, would call or write if there were any questions or changes, and the absence of a call or letter constituted approval, was proper under the Order. 7 C.F.R. § 981.40(d) (1989). (Tr. 442, 467-69)

12. . . . .

13. It was not a violation of the AMAA for individual handlers who sold almonds for almond butter, almond oil and/or cattle feed during the Program to keep their proceeds, as opposed to having the proceeds distributed pro rata among all of the handlers. 7 U.S.C. §§ 608c(6)(C)-(E) (1988); 7 C.F.R. § 981.67 (1989).

14. Sections 981.41 and 981.441 of the Order are in accordance with sections 8c(6)(I) and 10(b)(2)(ii) of the AMAA. There is no requirement in the AMAA that the Board must engage in advertising, as opposed to [other] promotional work, before the handlers can be assessed. 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii) (1988); 7 C.F.R. §§ 981.41, .441 (1989).

15. . . . .

16. Section 981.441 was properly promulgated through informal rulemaking, and was not required to be promulgated through formal rulemaking. The AMAA only requires formal rulemaking for the promulgation of the marketing order. Section 981.41 was promulgated through formal rulemaking. Section 981.441 is a regulation implementing section 981.41, and thus only requires informal rulemaking. *Vermont Yankee Nuclear Power*

Corp. v. *Natural Resources Defense Council Inc.*, 435 U.S. 519, 524 (1978); 7 U.S.C. § 608c(3) (1988).

17. Section 981.441 of the Order is not an unlawful delegation of authority by the Secretary to the Board. The Board makes the initial determination as to whether a handler's advertisement should receive credit. The Secretary retains the ultimate authority to make the final decision as to what advertisements will be acceptable for credit toward a handler's assessment. 7 C.F.R. §§ 981.40(d), .41(c), .441(c)(6)(v) (1989).

18. The annual rules from 1980-86, establishing the creditable assessment rate, were supported by substantial evidence in the rulemaking record. (PX 40, 41, 61, 62, 63, 77-80, 82, 95, 98, 99; RX 44, 69, 74, 87, 94-100, 103, 105-112, 114-117, 119, 120, 122-126, 131-133, 138, 139)

19 . . . .

20 . . . .

21. The assessments of almonds held in reserve pursuant to section 981.81 of the Order are in accordance with law. Section 981.81 provides that a handler must pay an assessment on almonds received by him for his own account. Section 981.10 defines almonds held for the account of the handler to include all almonds received by him, including all almonds of his own production. 7 C.F.R. §§ 981.10, .81 (1989).

22. Section 981.81 of the Order does not violate section 10(b)(2)(ii) of the AMAA. Section 10(b)(2)(ii) requires handlers to pay their pro rata share of the expenses of the Board, except expenses incurred in receiving, handling, holding or disposing of almonds by the Board for the benefit or account of persons other than handlers subject to the Order. Petitioners are handlers subject to the Order; thus they are not exempt from paying their pro rata share of the costs of the Board. 7 U.S.C. § 610(b)(2)(ii) (1988).

23. Sections 981.41, 981.81 and 981.441 of the Order do not violate the First Amendment of the United States Constitution. U.S. Const. amend. I. While the Petitioners' First Amendment rights are implicated, the government has adopted the AMAA to serve compelling state interests, that were ideologically neutral, and

that could not have been achieved through less restrictive means. *Frame*, 885 F.2d 1119; 36 Fed. Reg. 20,887, 20,889 (1971); 35 Fed. Reg. 7428, 7432 (1970); 15 Fed. Reg. 3623, 3624 (1950).

24. The creditable assessment rate is not a tax, but rather a lawful delegation by Congress of its authority under the Commerce Clause of the United States Constitution. *Skinner* v. *Mid-America Pipeline*, [490 U.S. 212], 109 S.Ct. 1726 (1989); *Frame*, 885 F.2d 1119; 658 F. Supp. at 1479; U.S. Const. art. I, § 8, cls. 1, 3; 7 U.S.C. § 608c(l) (1988).

DISCUSSION

1. Standard and Scope of Review.

The Department's Judicial Officer clearly set forth the standard and scope of review for a hearing pursuant to section 8c(15)(A) of the AMAA in *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 86-91 (1988), *aff'd in part and remanded sub nom., Riverbend Farms, Inc.* v. *Yeutter*, No. CV F-88-89 EDP (E.D. Cal. June 14, 1989), [*appeal docketed*, No. 90-15505 (9th Cir. Apr. 24, 1990), No. 90-15781 (9th Cir. June 11, 1990)]. Petitioners have the burden of proving that the challenged provisions of the Order and the obligations imposed by it are "not in accordance with law." *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663 (1974), *aff'd*, No. 22-75 (D.D.C. [Aug. 21, 1975)], printed in 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976). As explained in *In re Michaels Dairies, Inc.*, 33 Agric. Dec. at 1701 (citations omitted):

> The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act....
>
> The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence ....
>
> Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid....

The scope of review is the arbitrary and capricious standard as contained in section 706(2)(A) of the APA. 5 U.S.C. § 706(2)(A)

(1988). This scope of review is a narrow one as set forth in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (citations omitted):

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

While the court is not to substitute its judgment for that of the agency, the reviewing court must find that there was a reasoned basis for the Secretary's decision:

> This standard of review is a highly deferential one. It presumes agency action to be valid. . . . Moreover, it forbids the court's substituting its judgment for that of the agency, . . . and requires affirmance if a rational basis exists for the agency's decision. . . .
>
> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors. . . ." Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful. . . ."

Ethyl Corp. v. *EPA*, 541 F.2d 1, 34-35 (D.C. Cir. 1976) (en banc), *cert. denied*, 426 U.S. 941 (1976) (citations and footnotes omitted) (quoting *Overton Park*, 401 U.S. at 416). The Secretary must demonstrate a "rational connection between the facts found and the choices made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). Thus, Petitioners must prove that the decision of the Secretary was not supported by the record, not merely that another alternative existed, as explained by the Judicial Officer in *Sequoia Orange*, 47 Agric. Dec. at 90:

[I]t is for the Secretary in his rulemaking capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and . . . even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary.

II. 981.31 of the Order.

Section 981.31 of the Order provides for the membership of the Board:

> Two members and an alternate for each member shall be selected from nominees submitted by each of the following groups designated in paragraphs (a) through (d) of this section, or from among other qualified persons belonging to such groups; and one member and an alternate member shall be selected from nominees submitted by each of the following groups designated in paragraphs (e) and (f) of this section, or from among other qualified persons belonging to such groups:
>
> (a) The cooperative handlers;
>
> (b) All handlers, other than cooperative handlers;
>
> (c) Those growers who market their almonds through cooperative handlers;
>
> (d) Those growers who market their almonds through other than cooperative handlers;
>
> (e) The group of cooperative handlers or the group of handlers other than cooperative handlers whichever during that part of the then current crop year through March 31 received for their own account more than 50 percent of the almonds delivered by growers; and
>
> (f) Those growers whose almonds were marketed during that period of the then current crop year through March 31, through the handler group specified in paragraph (e) of this section.

7 C.F.R. § 981.31 (1989).

Petitioners first argue that section 981.31 of the Order is not in accordance with law, second that section 981.31 violates their right to due process, equal protection, and constitutes an unlawful delegation of authority, and third that section 981.31 violates section 8c(7)(A) of the AMAA.

First, Petitioners argue that section 981.31 of the Order is not in accordance with law and is not supported by substantial evidence in the rulemaking record, because it allows a majority of the Board's ten positions to be held by persons associated with a single entity, namely the cooperative, Blue Diamond. Petitioners allege that if less than a majority of the members of the Board vote to recommend an action to the Secretary, then that action is not forwarded to the Secretary, thus substantial power is wielded by the Board. With the exception of recommendations for research, development, advertising and promotion, which require seven affirmative votes, all other matters coming before the Board can be passed upon [a majority vote, which, if all 10 members are present, requires] six affirmative votes. 7 C.F.R. §§ 981.40(b), (e) (1989).

Petitioners explain that from 1950 to 1988, Blue Diamond had six seats on the Board every year but three, 1980, 1981, and 1987. (Tr. 216-17; St. ¶ 12) Since the mid-1970's the members of the Board representing the cooperative, Blue Diamond, have always voted in unison with each other. (Tr. 215-16, 219) But the members of the Board representing the independent handlers and growers have not always voted in unison. (Tr. 219) As a result, the cooperative not only has the majority representation on the Board, but may bloc-vote against recommendations by the independent handlers and growers.

Petitioners note that the Secretary was aware that the views of the cooperative and the independent handlers and growers of industry problems differed:

> A board on which each of the industry groups of growers and handlers is represented would be fair and equitable. The representation on the board of the six industry groups by 10 members would give adequate representation to growers and handlers. Distinction should be made between cooperative handlers and other than cooperative (or independent) handlers, because these groups tend to have somewhat different views on

> various almond marketing problems. Each is of importance to the almond industry and each should, therefore, be represented on the board. Likewise, the growers marketing through cooperative handlers and the growers marketing through other than cooperative handlers should be given separate representation for the same reason. The granting of two member representatives to each of the aforementioned groups would, of course, result in an even balance of representation as between handlers and growers and as between the cooperative and other than cooperative segments. However, it is fair and equitable that majority representation on the board at any given time should be had by the then current dominant handler, judged in terms of the relative quantity of almonds handled.

Notice of Recommended Decision, 15 Fed. Reg. 3623, 3628 (1950). The Secretary acknowledged that Blue Diamond handled sixty-four percent of the previous crop and as a result would immediately have six seats on the Board. *Id.* The Secretary stated that a majority vote would be required by the Board in accord with usual business practice:

> All decisions of the control board, except where otherwise specifically provided, should be by a majority vote of the members present. The presence of six members should be required to constitute a quorum. The fixing of the majority of the membership as a quorum and the making of decisions as to relatively routine matters on the basis of the majority of the members present, so long as there is a quorum, are in accordance with usual business practice.

Id. at 3630.

In the Decision, the Secretary speculated that the cooperative would vote as a unit and that the independent handlers and growers would vote as a unit:

> While, at the beginning, the cooperative group would have majority representation on the board by reason of the fact that it handles the greater portion of the almond crop, there is no certainty that this situation will continue indefinitely. There was also a strong indication at the hearing that the independent

> group would also tend to vote as a unit in that regard. Therefore, to require the affirmative vote of seven members would, in effect, amount to a requirement for the unanimous vote of the board, which, in the circumstances, would seem to be an impracticable requirement.

Decision With Respect to a Proposed Marketing Agreement and Order, 15 Fed. Reg. 4272 (1950). Petitioners argue that the Secretary's findings support their claim that the Secretary intended to render meaningless the representation of the independent handlers and growers on the Board.

Petitioners contend that the Secretary's decision to allow a single entity to hold a majority of the seats on the Board, and to require only six votes for recommendations to the Secretary was arbitrary and capricious, and not supported by substantial evidence in the record. Petitioners cite to section 8c(6) of the AMAA arguing that Congress expressly determined that marketing order provisions were to be equitable and that Congress never intended that the Board be dominated by the competitors of the independent handlers and growers.

Respondent explains that the assertion by Petitioners that the majority representation of the Board, by Blue Diamond, precludes the minority positions from ever reaching the Secretary is false. The positions of the minority are submitted to the Secretary. The minutes of the Board meetings along with reports are sent to the Secretary. (Tr. 435-36)

Respondent argues that Petitioners have not met their burden of proof. Respondent explains that Petitioners have not cited evidence that indicates that there was no support for the Secretary's decision, but instead Petitioners argue alternative ways of forming Board membership. Respondent further contends that Petitioners confirmed that the rulemaking record illustrates that the Secretary's decision was based on reasoned decision making by its quotes from the Recommended Decision and the Decision.

When establishing the Order, the Secretary acknowledged that there were two entities in the almond industry — the cooperative and the independent handlers and growers. The Secretary noted that the views of the two groups tend to be different. The

Secretary emphasized that each group is of importance to the almond industry and therefore should be represented on the Board.

The Secretary drafted the regulations specifying membership of the Board, knowing that Blue Diamond would initially maintain six of the ten seats on the Board and that it was likely to bloc vote their six votes. The Secretary also speculated that the independents might bloc vote their votes. The Secretary provided that if the independents did not agree with Blue Diamond's views, their views would be considered carefully by the Secretary before he reached his final decision:

> In other words, in case the independent group should not agree with the estimates and recommendation adopted by the board, its views together with all data in support thereof, would still be considered carefully by the Secretary before he reaches his final decision. The proposed way of handling is consistent with the way of handling the matter which has been followed in regulatory programs of this kind involving other tree nuts, and, in those other programs, it has happened on a number of occasions, that the Secretary has not followed the recommendations of the administrative agency when other data available to him has indicated that he should not do so.

15 Fed. Reg. 4272 (1950).

The views of the minority are submitted to the Secretary through the Board's minutes and reports. Petitioners have failed to show that the minority's view on any recommendation was not considered by the Secretary.

Although Blue Diamond can bloc vote their six votes, this is not a violation of the AMAA. The Judicial Officer addressed this issue in *Sequoia Orange*, 47 Agric. Dec. at 202-05, explaining that the AMAA was designed to benefit cooperative associations. As stated in the Senate Report in relation to the AMAA:

> The operations of cooperative marketing associations will be reenforced by these sections, which will assure the cooperation of processors and distributors in programs intended to raise farm prices.

S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935). Further, the Supreme Court has approved of bloc-voting by dairy cooperatives under the AMAA. *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 559-60 (1939); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 286-89 (1977). *aff'd,* No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980).[6] The importance of cooperatives is explained in [*Sequoia Orange*,

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[6] [*Sequoia Orange*, *supra,* states (47 Agric. Dec. at 202):

In addition, as stated in *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 286-89 (1977), *aff'd*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980):

Moreover, the Supreme Court has expressly approved block-voting by dairy cooperatives under the Act even if the effect of the Order gives the cooperatives a monopoly of the market. Specifically, the Court held in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 559-560:[7]

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[7] See, also, *H.P. Hood & Sons* v. *United States*, 307 U.S. 588, 599.

It is quite true that the League [*i.e.*, a cooperative] which itself cast two-thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote against the Order. This arises from the provision of the Act [7 U.S.C. 608c(12)], authorizing cooperatives to express the approval or disapproval for all their members or patrons. This is not an unreasonable provision, as the cooperative is the marketing agency of those for whom it votes. If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. *If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act* or justify the refusal of the injunction. [Footnotes omitted; emphasis supplied.]

supra, 47 Agric. Dec. at 20304, quoting from] *Lamers Dairy*, [36 Agric. Dec.] at 287-88 ...:

> The programs for the regulation of milk marketing under the Act [AMAA] are largely an extension and continuation of the work of cooperative marketing associations prior to this legislation.[8]

It was recognized early in the administration of the Act that without a strong cooperative in a milk market "the cornerstone for a successful program is lacking." *Report of the Associate Administrator of the Agricultural Adjustment Administration, in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation* (1939), p. 31. "It would be impossible to have the type of regulatory program which exists today without strong cooperative organizations." *Id.* at p. 30. [See, also, Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 467-478; Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), pp. 267-268.]

The distinction under the Act between cooperatives and other handlers, and the encouragement to be given cooperatives under Federal Milk Orders, was recognized in *United States v. Rock Royal Co-op., supra*, 307 U.S. 533, 562-564, as follows:

> Different treatment has been accorded marketing cooperatives by state and federal legislation alike. Indeed the Secretary is charged by this Act to "accord such recognition and encouragement to producer-owned and producer- controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of

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[8] See, *Economic Standards of Government Price Control*, Monograph No. 32 (76th Cong., 3rd Sess., Senate Committee Print for the Use of the Temporary National Economic Committee in the Investigation of Concentration of Economic Power), pp. 58-59; Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 192-196; Bartlett, *Cooperation in Marketing Dairy Products*, pp. 188-210; *Agricultural Co-operation in the United States* (Farm Credit Administration, April 1947), p. 45 *et seq.*]

Congress,[9] and as will tend to promote efficient methods of marketing and distribution." [7 U.S.C. 610(b)(1)]. These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment.

[* * *]

[The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons. [Footnotes omitted.]

[Similarly, the favored position of producers under the Act (which includes, of course, cooperatives) was expressed in *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1709 (1974), affirmed *sub nom. Michaels Dairies v. Butz*, [No. 22-75] 34 Agric. Dec. 1319, 1320, 1323 (D.D.C. [Aug. 21, 1975]), affirmed, [546] F.2d [1043] (No. 75-2023, C.A. D.C., decided December 17, 1976), as follows:

[Where there is a clash of interests between the handlers on the one side and the producers and consumers on the other,

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[9] [Numerous acts of Congress deal with cooperatives differently from proprietary business enterprises, and enunciate the policy of aiding and encouraging the establishment, operation, and growth of marketing cooperatives. Some of the instances of the Congressional policy of special consideration for, and treatment of, cooperatives are in the Agricultural Marketing Act of June 15, 1929 (12 U.S.C. 1141, 1141j); the Clayton Act (15 U.S.C. 17); the Capper-Volstead Act (7 U.S.C. 291); the Robinson-Patman Act of June 19, 1936 (15 U.S.C. 13b); the Commodity Exchange Act (7 U.S.C. 10a); and the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2301 *et seq.*). See, also, Nourse, *The Legal Status of Agricultural Cooperation*, pp. 241-266; and Hulbert, *Legal Phases of Co-operative Associations* (Farm Credit Administration, May 1942), pp. 307-322.]

the statute provides a clear-cut basis for resolving the clash. Orders issued under the Act are "principally for the economic protection of producer and consumer" *(United States v. Mills,* 315 F.2d 829, 837 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819). The Act provides for the issuance of marketing Orders with or without handler approval (7 U.S.C. 608c(8) and (9)). In practice, almost no handler ever agrees to sign a milk marketing agreement, and all of the approximately 60 milk Orders were promulgated after the handlers refused to agree to the programs. It is not unusual for handlers such as petitioner to be unhappy with a program designed to regulate them for the benefit of producers and consumers.]

The Judicial Officer has declared that with respect to the Supreme Court's approval of bloc voting by dairy cooperatives, "the same reasoning is, of course, applicable to cooperatives handling navel oranges." *Sequoia Orange*, 47 Agric. Dec. at 204. This reasoning also applies to cooperatives handling almonds.

The Judicial Officer points out that this type of issue is more appropriate for a rulemaking hearing, rather than a section 8c(15)(A) hearing. Blue Diamond's dominant role [on the Board] is a result of the Order and is entirely consistent with the congressional purpose of this regulatory program. *Id.* at 205.

Therefore, the Secretary's decision was not arbitrary and capricious and was supported by substantial evidence in the record. The Secretary considered the fact that Blue Diamond might dominate the Board, but found that the composition of the Board was equitable.

Petitioners also argue that section 981.31 of the Order violates section 8c(6) of the AMAA. 7 U.S.C. § 608c(6) (1988). Section 8c(6) is not applicable. It provides that the handling of a commodity shall be equitable among the handlers. This provision does not involve the composition of industry committees.

In support of their argument that composition of the Board is unfair, Petitioners cite to *Gibson v. Berryhill,* 411 U.S. 564 (1973), where the pecuniary interest of members of the Board of Optometry disqualified them from membership on the board. The board members were optometrists in private practice, who would be

considering the revocation of licenses of optometrists that worked for business corporations, their competitors.

This case is not applicable to the facts present here. The board in *Gibson* functioned in an adjudicatory manner with the power to revoke the licenses of their competitors. The Almond Board does not have adjudicatory functions, nor does the Board have any decision making power that could directly put the Petitioners out of business. The Board has only the power to make recommendations to the Secretary. The Secretary has final approval of all Board actions. 7 C.F.R. §§ 981.38, .40(d) (1989).

Second, Petitioners argue that section 981.31 of the Order violates their right to due process, equal protection and constitutes an unlawful delegation of authority.

Petitioners argue that the Board is allowed to make law. Petitioners refer to arguments that appear later in its brief explaining the specific instances where the Board made law.

Petitioners contend that the Due Process Clause of the United States Constitution does not allow the Secretary to set up the Board in such a way that one entity can dominate the Board. U.S. Const. amend. V. Petitioners argue that Congress never intended this result.

Petitioners' argument centers on their allegation that recommendations are made only to the Secretary upon a majority vote of the Board and that this is unfair since the independent growers and handlers can never have a majority vote, and as a result cannot make recommendations to the Secretary. In their reply brief, Petitioners alter their argument, stating that the Secretary is only asked to engage in rulemaking when the Board makes a recommendation that has been voted upon unanimously by the Board members. Petitioners assert that the Secretary never addresses the dissenting point of view unless it is contained in a written statement to the Secretary in response to the issuance of a proposed rule and an invitation to comment.

Petitioners also argue that they have been denied equal protection of the laws as guaranteed by the United States Constitution. U.S. Const. amend. V. Petitioners explain that the discrimination is based upon voting rights, membership, majority

control, and the association with either the independent handlers and growers or the cooperative.

Respondent argues that there is no unlawful delegation of authority as the Secretary has retained all of the enforcement and implementation authority:

> (d) *Right of the Secretary.* The members of the Board (including successors or alternates), and any agent or employee appointed or employed by the Board, shall be subject to removal or suspension by the Secretary at any time. Each and every order, regulation, decision, determination, or other act of the Board shall be subject to the continuing right of the Secretary to disapprove of the same at any time, and, upon such disapproval, shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith.

7 C.F.R. § 981.40(d) (1989). Respondent explains that constitutional challenges directed against marketing orders because of their administration by industry members have been specifically denied for this reason. *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); *Whittenburg v. United States*, 100 F.2d 520, 522-23 (5th Cir. 1938). *See also, Vaughn-Griffin Packing Co. v. Freeman*, 294 F. Supp. 458, 467-68 (M.D. Fla. 1968), *aff'd*, 423 F.2d 1094 (5th Cir. 1970); *See also, Sequoia Orange*, 47 Agric. Dec. at 180-85 (Judicial Officer holds that California-Arizona Navel Orange Regulatory Program does not constitute an unlawful delegation of authority). The Third Circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, ___U.S.___, [110] S. Ct. 1168 (1990), rejected the claim that an industry committee's administration of the Beef Promotion and Research Act constituted an unlawful delegation of authority. The Beef Promotion and Research Act was modeled after the AMAA. The court first found that Congress had not unlawfully delegated authority to the Secretary:

> It is plain that the Beef Act does not unlawfully delegate legislative authority to the Secretary. "So long as Congress provides an administrative agency with standards guiding its action such that a court could ascertain whether the will of Congress had been obeyed, no delegation of legislative power

> has occurred." *Skinner v. Mid-America Pipeline*, [490 U.S. 212], 109 S.Ct. 1726, 1731, (citing *Mistretta v. United States*, [488 U.S. 361], 109 S.Ct. 647, (1989)).

Frame, 885 F.2d at 1128. In fact, the court found that "under the Beef Promotion Act, Congress has delegated to the Secretary far less discretion than the Supreme Court has previously sanctioned in applying the non-delegation doctrine." *Id.*

The Act directed the Secretary to promulgate a Beef Promotion and Research Order. The Act further provided for a Cattleman's Beef Promotion and Research Board to administer the order under the supervision of the Secretary. Next, the court found that the Secretary had not unlawfully delegated authority to the board. The court applied the standard used in *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 399 (1940), where pursuant to the Bituminous Coal Act of 1937, members of the coal industry were authorized to fix minimum prices for Bituminous Coal Code members in accordance with stated standards, with final approval from the agency charged with administering the Act:

> The members of the code function subordinately to the Commission. [The Commission] not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.

Frame, 885 F.2d at 1128. The *Frame* court stated:

> [W]e find that the amount of government oversight of the program is considerable, and conclude that no lawmaking authority has been entrusted to the members of the beef industry. Both the Act and the Order render the actions of the Cattlemen's Board subject to the Secretary's pervasive surveillance and authority.

Id. at 1128-29. As noted by the court, "all budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary. . . ." *Id.* at 1129 (citation omitted).

There is no unlawful delegation of authority here. As Respondent explains, the Secretary has retained all of the

enforcement and implementation authority under the Order. The Almond Board submits all budgets, plans, projects and recommendations to the Secretary for his approval. The Secretary has the final approval of all Board actions. The Board acts subordinately to the Secretary. "Congress may entrust administrative activities to an industry group, without violation of the nondelegation doctrine, . . . if the industry members function subordinately to a government agency." *Sequoia Orange*, 47 Agric. Dec. at 182. While Petitioners claim that the Board makes law and that examples of these instances appear later in their brief, they are unable to provide an example of where the Board has acted without prior approval from the Secretary. The Board has no lawmaking functions and the Secretary retains ultimate authority. Therefore, there is no unlawful delegation of authority.

Petitioners state that *Chiglades Farm* and *Whittenburg* are inapplicable. On the contrary they are directly applicable. In *Chiglades Farm,* 485 F.2d at 1134, the plaintiffs argued that the composition of the Florida Celery Committee vested control of the industry in a group of self-interested producers and deprived them of due process of law. The plaintiffs contended that, despite the Secretary's ultimate authority, he exercised no independent judgment. The court found that the Secretary had the ultimate authority and that the checks on the committee's powers were effective. In *Whittenburg*, 100 F.2d at 522, the plaintiffs argued that the AMAA is an unconstitutional delegation of legislative powers. The court found that the industry committee had not been given any legislative power and that any action taken was always that of the Secretary.

Respondent states that Petitioners' arguments that section 981.31 of the Order violates their right to due process and equal protection of the laws are based on long discredited theories and therefore, should be rejected. Respondent explains that no economic regulation has been invalidated on substantive due process grounds since 1937, and that equal protection is also no longer used to invalidate an economic regulation. G.Gunther, *Constitutional Law*, 441, 472 (1985).

I agree with Respondent that due process and equal protection are no longer viable arguments with which to invalidate economic

regulations [such as those involved here]. The Supreme Court demonstrated that it intends to take a [more] "hands-off" approach to economic legislation:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . .
>
> The doctrine that prevailed in *Lochner*, . . . and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) (referring to *Lochner v. New York*, 198 U.S. 45 (1905)). *Accord, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

Respondent further argues that even if Petitioners' arguments were considered, they would fail, as the Secretary has a rational basis for the regulation and that is all that is required.

The modern due process analysis regarding an economic regulation is summarized in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955): "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Respondent explains that the rational basis for the Order is to promote the orderly marketing of California almonds, thereby increasing returns to producers and stabilizing the agricultural industry which would be in the public interest.

Respondent explains that the proper standard for Petitioners' equal protection argument is that the regulation must bear some "rational relationship to a legitimate state purpose." *City of Dallas v. Stanglin*, [490 U.S. 19],109 S. Ct. 1591, 1594 (1989). The rational basis test "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Id.* at 1596.

Respondent argues that the rational basis test is satisfied. The Secretary made a decision to establish a provision that majority membership on the Board would be determined by the amount of almonds handled in the previous year. This was equitable because there are two entities of almond handlers and growers.

Section 981.31 of the Order does not deny Petitioners their right to due process and equal protection under the law. Petitioners simply argue that they are denied due process and equal protection but never explain through constitutional analysis why. In their reply brief, Petitioners state that they believe that a stricter scrutiny than the rational basis test should be applied, but never provide any explanation or support for this argument. The law is clear that all that is required for review of a due process challenge is a rational basis for the regulation. *Lee Optical*, 348 U.S. at 488. The rational basis standard is also the appropriate standard to be applied to Petitioners' equal protection argument. The Court in *City of Dallas*, 109 S. Ct. at 1594, held that the rational basis test was the proper standard to be applied to an economic regulation that did not implicate a suspect class or impinge upon constitutionally protected rights. Petitioners do not assert that they are a suspect class, and it has been decided that it does not impinge upon constitutionally protected rights. While the Equal Protection Clause of the United States Constitution is only applicable to the states through the Fourteenth Amendment, the Court has made the equal protection guarantee applicable to the federal government through the Fifth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Therefore, the Secretary need only show that section 981.31 of the Order bears some rational relationship to a legitimate purpose. I have already decided that the Secretary's decision relating to the composition of the Board was supported by substantial evidence in the rulemaking record. Thus, there is a rational relationship to a legitimate purpose. The purpose was to set up the Board to administer the Order. The Secretary gave four seats to each entity in the industry, with the last two seats going to the entity that handled the most almonds in a given year. The AMAA, which provided that the Secretary may set up the Board, benefits cooperatives. This decision was made by Congress, and, until the

AMAA is amended, cooperatives will be able to dominate industries regulated by marketing orders.

In support of their argument that they are denied equal protection of the laws, Petitioners cite to two recent cases. The first is *Board of Estimate v. Morris,* [489 U.S. 688], 109 S. Ct. 1433 (1989), which held that the composition of the board of estimate for the City of New York, representing boroughs having widely disparate populations, but equal representation on the board, violated the Equal Protection Clause of the United States Constitution. The Court found that the "one person, one vote" requirement of the reapportionment cases was applicable because all officials on the board were selected by popular vote. The Court also found of major significance that the board shared legislative functions with the city council. *Id.* at 1439.

This case is inapplicable to the present situation. The Court explains that the equal protection guarantee of "one person, one vote" is applicable to congressional districting plans, state legislative districting, and local government apportionment. *Id.* at 1437. The members of the Almond Board are not elected by popular vote, thus the equal protection guarantee of "one person, one vote" is not triggered. The Board is not a legislative body exercising legislative functions.

The second case is *Quinn v. Millsap,* 490 U.S. [95], 109 S. Ct. 2324 (1989), which held that the requirement that one had to be a landowner to be a member of a board to consider reorganization of governmental structures and responsibilities for the City and County of St. Louis, violated the Equal Protection Clause of the United States Constitution. The Court found that "the Equal Protection Clause protects the 'right to be considered for public service without the burden of invidiously discriminatory disqualifications. . . .'" *Id.* at 2331.

This case is also inapplicable. In *Quinn*, the requirement of landownership, was a total blockade for membership of the board: "[I]t is a form of invidious discrimination to require landownership of all appointees to a body authorized to propose reorganization of local government." *Id.* at 2331-32 (emphasis added). Here, Petitioners are not questioning their right to participate, but they are questioning how much representation they have. These are two

very different issues. There is also some question whether *Quinn* is at all relevant since it is dealing with the composition of a governmental body, as was *Board of Estimate*. Further, Petitioners have not demonstrated that they are victims of invidious discrimination. Finally, if the equal protection guarantee was triggered, all that would be required is a rational basis for the regulation. *Quinn*, 109 S. Ct. at 2332. As has already been decided, there is a rational basis for the composition of the Almond Board.

Third, with regard to section 981.31 of the Order, Petitioners argue that it violates section 8c(7)(A) of the AMAA. 7 U.S.C. § 608c(7)(A) (1988). Section 8c(7)(A) provides:

> Terms common to all orders
>
> (7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:
>
> (A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

Petitioners contend that section 8c(7)(A) should be construed as mandatory and not permissive. Petitioners explain that while the language indicates that Congress did not require the Secretary to include all of the subsections of section 8c(7), that as a matter of law statutes should be construed and interpreted in such a manner to avoid any violation of the United States Constitution. Thus, if the AMAA is construed as permitting the Secretary to allow a single entity to unfairly compete with its competitors, that is a violation of the Petitioners' guarantee to equal protection and there is no rational basis to support section 981.31 of the Order. Petitioners argue that to permit the Secretary to allow the Board to be dominated by one entity would render moot section 8(d)(1) of the AMAA, which requires the Secretary to prevent an abuse of the privilege of exemptions from the antitrust laws. 7 U.S.C. § 608d(l) (1988).

Respondent [correctly] argues that section 8c(7)(A) is permissive and not mandatory. In addition, Respondent [correctly] explains that section 8c(7)(A) is not a provision requiring anything, so it cannot be violated.

In determining the meaning of a statute, interpretation begins by examining the plain language of the statute. *Mallard v. United States District Court,* [490 U.S. 296], 109 S. Ct. 1814, 1818 (1989). The plain language of section 8c(7)(A) states that "orders shall contain one or more of the following terms and conditions." This language is clearly permissive, not mandatory. A term or condition listed in section 8c(7)(A)-(D) may be part of a marketing order, but is not required. Thus, the Secretary is not required to make section 8c(7)(A) part of the Order.

Further, there is no need to construe the Order to prevent a violation of the United States Constitution; as has already been decided, the Order does not violate the Petitioners' right to equal protection under the laws.

Petitioners' argument that section 8d(l) is rendered moot by section 981.31 of the Order is misplaced. Section 8d(l) refers to the disclosure of information. Section 8d(l) provides in relevant part:

> (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. . . .

7 U.S.C. § 608d(l) (1988). This provision does not state that the Secretary shall prevent an abuse of antitrust laws; rather, it provides for the release of information to the Secretary for a determination to see if an abuse has occurred. Petitioners do not explain how this section of the AMAA is relevant.

III. The Market Development Program [and Reserve Obligations].

The Almond Butter Market Development Program ("Program") was instituted in 1982. The purpose of the Program [and the 1982-crop reserve obligations were] explained by the

Secretary in the final rule [establishing the 1982-crop salable and reserve percentages] (RX 4):

> [The remaining two percent (6.8 million pounds) of the 1982 marketable production must be withheld by handlers to meet their reserve obligations.] These almonds [reserve almonds] will be available to develop outlets noncompetitive with normal domestic and export outlets. The development of such outlets is a long-term necessity for the industry because of anticipated larger crops. The Board plans to use the reserve to develop a market for almond butter and has presented an industry-wide project. The Board's objective is to develop a permanent consumer demand for almond butter and related products that, in time, will absorb a large quantity of almonds. To insure success with this project, the Board believes that initially it is necessary to keep almond butter competitive with peanut butter, which currently dominates the market. In addition, the Board plans to promote the use of almonds in school lunch programs with the objective of encouraging school authorities to buy almonds for those programs on a regular basis. Reserve almonds could also be disposed of in other eligible noncompetitive outlets authorized by the order.

There was considerable energy expended by the parties over whether to refer to the Program as the "Almond Butter Program" or the "Market Development Program." However, what is important is not the name, but the substance of the Program.

Petitioners have three arguments relating to the Program: (1) the Program lacked a rational basis in the rulemaking record; (2) the Secretary erred by failing to specify in the final rules the percentage of the reserve to be allocated to the Program for the crop years 1984-86; and (3) the Secretary should have allowed notice and comment on the determination of the minimum prices [required to be charged to buyers] and special assessments on almonds disposed of under the Program.

First, Petitioners argue that the Program lacked a rational basis in the rulemaking record. Petitioners contend that there was no justification to impose the reserve to develop a market for almond butter. There was no explanation in the 1982 final rule to indicate that almond butter could compete with peanut butter, that such a

program would be successful, or that the industry actually needed a butter program in anticipation of larger crops.

Petitioners argue that a reserve cannot be imposed unless it is for supply management and that this reserve was not supply management. Petitioners rely on the report of the AMS field agent: "Obviously a 2% reserve is not supply management in any sense, but such establishment is necessary in order to give the industry an opportunity, on a uniform basis, to develop an almond butter market." (RX 7)

Petitioners assert that the reserve imposed for the 1983-84 crop year, with respect to the Program, was even more arbitrary and capricious than it was for the previous year. For the 1982-83 crop year, there were 340 million pounds of marketable supply produced in California, with a trade demand of 360 million pounds. (RX 4) For the 1983-84 crop year, there were 230 million pounds of marketable supply, with a trade demand of 320 million pounds. (RX 16) Thus, for the 1983 crop year, there was a difference of 90 million pounds needed to supply the trade demand, while in 1982, there was only 20 million pounds needed. For the 1983 crop year, the Secretary imposed a three percent reserve (6.9 million pounds) which could only be used for sale into almond butter or non-competitive outlets such as cattle feed. (RX 16 [; 7 C.F.R. § 981.66(c)]) Petitioners contend that the reason the 1983-84 reserve was more arbitrary than the 1982-83 reserve was that in the 1983-84 final rule, the Secretary stated that most of the two percent reserve in 1982-83 went to inedible outlets rather than into almond butter. (PX 16)[7]

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[7] [Petitioners overlook the carryover statistics, which destroy their argument. The estimated supply to satisfy the estimated demand for a particular crop year consists of the carryover from the prior year (i.e., the almonds from the prior year's crop still on hand at the beginning of the crop year) plus the estimated production. Consideration must also be given to the amount desirable to be carried over at the end of that crop year for early season shipments during the following crop year (before the following year's crop is available for market). The following statistics are set forth in the Secretary's final rules for the 1982-83 crop and the 1983-84 crop (RX 4; PX 16):

Petitioners contend that the reserve amounts for 1984-85 and 1985-86 crop years were not supported by substantial evidence in the rulemaking record. Petitioners argue that the Secretary did not independently, from the Board's recommendation, perform any analytical and judgmental functions to determine if the recommended reserve was justified. Further, the Secretary's basis and purpose statement was not sufficiently detailed and informative to explain the reason for the reserve. 5 U.S.C. § 553(c) (1988).

Respondent argues that the Secretary had a substantial basis in the rulemaking record for the institution of the reserve for the crop years 1982-1986. The purpose of the Program was to develop a market which would reduce future surpluses, provide additional outlets for almonds, such as almond butter, and as a result, increase grower returns. (RX 6, p. 33) For each rule, the Secretary reviewed transcripts of Board meetings, minutes, reports from the AMS field agent and various other documents, including resolutions, correspondence among industry members, and recommendations. Respondent explains that those documents were replete with support for a reserve to create a market for almond butter. Respondent notes that the Board vote on the recommendation, for the nine rules establishing reserves during the four-year Program, was unanimous eight of the nine times. (RX 2)

	1982-83 Crop *Million Pounds*	**1983-84 Crop** *Million Pounds*
Carryover from Prior Year	161	178.9
Est. Production	*340*	*230.0*
Total Supply	501	408.9
Est. Demand	360	320
Est. Desirable Year-end Carryover	*134.2*	*82*
Demand + Year-end Carryover	494.2	402
Est. Surplus	6.8 (2%)	6.9 (3%)

Hence, considering the total estimated supply and demand situations, there was an estimated 2% surplus for the 1982-83 crop (6.8 <<triangle>> 340 = .02) and an estimated 3% surplus for the 1983-84 crop (6.9 <<triangle>> 230 = .03). As shown in the Additional Conclusions by the Judicial Officer, § I, there was an estimated 25% surplus for the 1984-85 crop and an estimated 20% surplus for the 1985-86 crop.]

There were nine rules because, for the 1984-85 and 1985-86 marketing years, there was more than one rule, as the reserve percentage was changed.

The Secretary's decision to institute the Program was supported by substantial evidence in the rulemaking record. The Secretary in his rulemaking capacity is required to make policy judgments. Petitioners must demonstrate that those judgments were arbitrary and capricious and not supported by evidence in the record. Petitioners have not met that burden. The Secretary had a considerable amount of information before him consisting of Board meeting minutes, transcripts and reports, as well as the AMS field agent reports. (1982-83 crop year: PX 34, 36; RX 3, 4, 5, 6, 7, 15. 1983-84 crop year: PX 16, 41, 42; RX 18, 22, 24, 28. 1984-85 crop year: PX 46, 47, 48; RX 31, 35, 36, 37, 39, 40, 55; revisions: PX 19, 20, 21; RX 41, 44, 45, 46, 48, 49, 50, 52, 53, 59, 60. 1985-86 crop year: RX 56, 66, 67, 68, 69, 79, 80, 90; revisions: PX 23, 24, 61; RX 71, 72, 73, 77, 78.) The record was ample and sufficient for the Secretary to determine whether the Program would help meet the needs of the industry.

Petitioners did not meet their burden of proof with regards to the argument that a reserve cannot be imposed unless it is for supply management. Petitioners did not provide any support for this proposition. [Furthermore, the large anticipated surpluses for the 1984-85 crop and the 1985-86 crop *required* that a reserve be established for those years (see Additional Conclusions by the Judicial Officer, § I), irrespective of the Program, and the small anticipated surpluses for the 1982-83 crop and the 1983-84 crop would have authorized a reserve for those years, irrespective of the Program.]

With regard to Petitioners' argument that the rule imposing the reserve for the 1983-84 crop year was more arbitrary and capricious than the rule for the 1982-83 year, because most of the reserve went to inedible outlets, the Secretary explains that the Program was new to the industry and it required a considerable start-up period. (PX 16) [Moreover, see note 7, *supra*.]

Petitioners provide no support for their argument that the Secretary did not independently, from the Board's recommendation, perform any analytical and judgmental functions to determine

whether the recommended reserve amounts should have been adopted. Simply because the Secretary adopted the Board's recommendation does not lead to the conclusion that the Secretary rubber-stamped the Board's recommendations. The AMAA provides for a close working relationship between the Secretary and industry committees. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). Congress recognized the need to have industry committees comprised of experts in the respective industry to make recommendations to the Secretary:

> To the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the Agricultural Marketing Agreement Act of 1937, and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of the industry in how best to market a crop.

H.R. Rep. No. 271, 99th Cong., 1st Sess. 193. The court in *Chiglades Farm*, 485 F.2d at 1134, explained Congress' recognition that those with "the greatest knowledge of the industry's needs," the industry committees, would be qualified to make the necessary recommendations to the Secretary to benefit the industry.

The Secretary's decision as to the reserve amount for marketing years 1984-85 and 1985-86 was not arbitrary and capricious. As discussed previously, the Secretary had before him all of the information from the Board with respect to the amount of reserve that was recommended and why. The Secretary had already approved of the Program, and almonds needed to be allocated for the Program [, and there was an estimated 25% and 20% surplus, respectively, for those years (see note 7, *supra*)]. There was substantial evidence in the rulemaking record to support the amount of the reserve for the years 1982-86.

The basis and purpose statements for the rules imposing the reserves from 1984-86, for the Program were "sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted." *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C. Cir. 1974). The reserve for the Program had been utilized since 1982. The basis and purpose of the reserve was clear by this time. The purpose of the reserve was

to establish a market for almond butter to absorb the anticipated surpluses from the crops. This purpose was certainly reflected in the proposed and final rules. (RX 35, 36, 66, 67) The Secretary also responded to comments received after publication of the proposed rule. These rules did not differ from the ones imposing the reserve for the Program for the years 1982-83 and 1983-84.

. . .[8]

IV. Extension for Disposition of Reserve Almonds.

. . .[9]

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[8] [The omitted material is the AW's discussion of his conclusions 8 and 10, which state (Initial Decision at 19, 20):

8. The Secretary was in error by not specifying the percentage of the reserve almonds to be allocated to the Program. (RX 36, 67) The allocation of the reserve to the Program had a substantial impact upon the rights and interests of the handlers and should have been promulgated through APA rulemaking. 7 U.S.C. § 553 (1988).

. . . .

10. The Secretary should have promulgated the determination of the minimum prices and special assessments on almonds disposed of under the Program through APA rulemaking. The minimum prices and special assessments were substantive in nature and affected the handlers' disposition of their reserve almonds. 5 U.S.C. § 553 (1988).

For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, §§ I, II.]

[9] [The omitted material is the ALJ's discussion of his conclusion 12, which states (Initial Decision at 20):

12. The Secretary should have allowed notice and comment on the rule issued on or about August 20, 1986, extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987. (PX 25, 62, 63; RX 75, 87, 88).

For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, § III.]

V. Section 981.441 of the Order.

Section 981.441 of the Order establishes the standards for crediting for marketing promotion including paid advertising. 7 C.F.R. § 981.441(a) (1989). The authority for section 981.441 is found in section 981.41 of the Order which permits the Board, with the approval of the Secretary, to establish research and development projects [and marketing promotion projects (including paid advertising),] and to credit the pro rata expense assessment obligations of a handler. 7 C.F.R. § 981.41 (1989).

Petitioners have four arguments with respect to section 981.441: (1) section 981.441 is not in accordance with sections 8c(6)(I) and 10(b)(2)(ii) of the AMAA; (2) section 981.441 is not in accordance with section 8c(10) of the AMAA; (3) section 981.441 should have been promulgated through formal rulemaking; and (4) section 981.441 is an unlawful delegation of authority by the Secretary to the Board.

First, Petitioners argue that section 981.441 is not in accordance with sections 8c(6)(I) and 10(b)(2)(ii) of the AMAA. 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii) (1988). Section 8c(6)(I) provides (emphasis added):

> (i) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds . . . *such projects may provide for any form of marketing promotion including paid advertising and* with respect to almonds . . . *may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order* and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing

promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

Section 10(b)(2)(ii) states (emphasis added):

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

Petitioners explain that a handler may advertise and apply for credit towards his . . . assessments. (Tr. 237) If a handler does not advertise, or if the handler advertises but does not receive credit for his advertisements, the handler must pay his assessment directly to the Board. The money collected by the Board is used for administrative purposes. The Board does not engage in any paid advertising, but does [other] promotional work. Each year a public relations and advertising budget [, which includes *all* of the Board's

anticipated expenses for the year,] is developed for the Board. The budget is submitted to the Secretary for approval. (Tr. 317-19, 429; St. ¶ 7)

Petitioners argue that since the Board does not have an advertising campaign and does not engage in paid advertising, the Board cannot assess the handlers. Petitioners contend that the Secretary only intended for the Board to assess the handlers, if the Board itself had an advertising campaign. Petitioners cite to the Secretary's Recommended Decision with respect to the creditable advertising assessments explaining that the Secretary distinguished between paid advertising and promotional work:

> Although most of the evidence concerned itself with paid media advertising which should be creditable, the act also provides for crediting applicable to marketing promotion activities. While it was agreed by all witnesses that it is extremely difficult to distinguish between paid media advertising and marketing promotion activities, certain activities were referred to which should be considered as marketing promotion. These include point of sale material, public relation work, trade fairs, food page ads and supplements. *At some future time, the Board may want to consider crediting handler expenses for such marketing promotion activities.* However, before any handler receives credit for such activities, the Control Board, with the approval of the Secretary, should issue appropriate rules and regulations defining areas of creditable marketing promotion activity.

36 Fed. Reg. 20,887, 20,889-90 (1971) (emphasis added). Relying on the Recommended Decision and the Decision, Petitioners conclude that the Secretary intended that crediting to the handler for the handler's own advertising could only occur if the Board had its own advertising program. 37 Fed. Reg. 617 (1972). Petitioners contend that the Secretary stated that if the Board engaged in promotional work, which does not include advertising, then the Board could formulate rules to permit handlers to receive credit for their own promotional work.

Thus, Petitioners conclude that sections 981.41 and 981.441 are invalid since the Board engages in no advertising, as these sections were created to credit handlers for their own advertising.

The handlers should not have to pay money to the Board until the Board engages in paid advertising. The Board cannot assess handlers for money that is not used for an advertising campaign.

Further, Petitioners argue that sections 981.41 and 981.441 are invalid because section 8c(6)(I) of the AMAA precludes the assessments when the Board has no advertising campaign. [Petitioners argue that] sections 981.41 and 981.441 are also invalid because section 10(b)(2)(ii) of the AMAA only permits handlers to pay to the Board the handler's pro rata share of expenses as the Secretary may find are reasonable and likely to be incurred by the Board. Since the Board does not advertise, it cannot be considered a Board expense assessment, and as a result cannot be collected from the handlers.

Respondent argues two procedural arguments. First, Respondent argues that this issue should not be considered because Petitioners did not raise it in the Joint Submission of Issues To Be Decided, but first raised the issue in their brief.

The goal of the administrative process is to consider all issues reasonably associated with a matter unless the other party will be prejudiced by unfair surprise. *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979); *Jet Farms*, 88 AMA Docket No. 985-1. Respondent has not been prejudiced. Respondent replied to this argument in its brief and requested no additional time for response to this issue. Respondent had sufficient notice of the issue and was afforded an opportunity to respond. [However, the failure to raise an issue in the Petition is a jurisdictional matter. (See § VI, Additional Conclusions by the Judicial Officer).]

Second, Respondent argues that since Petitioners are arguing that section 981.441 is invalid, it must be an attack on section 981.41, which authorizes the former. Respondent explains that an 8c(15)(A) proceeding is to test the legality of a provision or the adequacy of the record supporting it, and that Petitioners are not challenging either.

Petitioners' argument is proper. They are arguing that section 981.441, which is authorized by section 981.41, is not in

accordance with law. Thus, they are challenging the legality of that provision.

Respondent argues that sections 981.41 and 981.441 of the Order are clear and unambiguous. The legislative history of a statute is only consulted when there is some ambiguity in the statute at issue. Section 981.41 allows the Board, with the approval of the Secretary, to provide a handler with a credit against his assessment for "a handler's direct expenditures for marketing promotion, including paid advertising." 7 C.F.R. § 981.41(c) (1989).

Respondent argues that section 981.41 demonstrates that the Secretary did not make a distinction between promotion and paid advertising in the Order. Section 8c(6)(I) of the AMAA also demonstrates that Congress did not make such a distinction. The AMAA provides for any form of marketing promotion, including paid advertising.

Respondent explains that the Petitioners argue that there are two assessments, one for advertising and one for promotion. There is only one assessment for promotional work including paid advertising,[10] and pursuant to section 10(b)(2)(ii) of the AMAA, the Secretary has determined that it is a reasonable expense. The Board establishes a [single] total budget, including promotional expenses, which, when approved by the Secretary, is funded by an assessment from handlers.

There is no support in the AMAA for Petitioners' argument that the advertising assessments are precluded because the Board does not have an advertising program. Neither the AMAA, nor the Secretary's Recommended Decision and Decision, makes a distinction between promotional work and paid advertising. Section 8c(6)(1) allows the Secretary to establish a project "for any form of marketing promotion including paid advertising." Section 10(b)(2)(ii) allows the Secretary to assess the handlers pro rata for the costs of the promotional program that the Secretary finds are reasonable and likely to be incurred by the Board. This is precisely

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[10] [This single assessment also pays for all other expenses of the Board, including all administrative expenses. 7 U.S.C. § 10(b)(2)(ii); 7 C.F.R. §§ 981.80, .81; RX 94, 96, 103, 106, 110, 115, 119, 126, 133, 137.]

what the Secretary has done in sections 981.41 and 981.441 of the Order. The assessment pays for more than the Board's promotional program, just as it would pay for more than advertising if the Board advertised. It also pays for administrative costs.

[The one paragraph from the Secretary's Recommended Decision, quoted above, which draws a distinction between advertising and marketing promotion activities, would not be sufficient to overcome the plain words of the Act and the Order, quoted above, which refer to "marketing promotion including paid advertising" (7 U.S.C. § 608c(6)(1); 7 C.F.R. § 981.41). Furthermore, petitioners overlook the fact that in the same Recommended Decision upon which they rely, the Secretary expressly used the term marketing promotion as including paid advertising 11 times, including the vital proposed § 981.41. Specifically, the Secretary stated (36 Fed. Reg. 20,887, 20,88891 (1971) (emphasis added)):

> [(3) The notice of hearing contained a proposal to add a new paragraph (e) to § 981.40 *Procedure*. The paragraph would require that eight affirmative votes of the Control Board are necessary for adoption whenever voting on recommendations pertaining to production research, marketing research and development projects, and *marketing promotion including paid advertising* and crediting of certain eligible paid advertising expenditures of handlers. [20,288]
>
> . . .
>
> [The act also provides for authorizing for almonds, paid advertising and the authority to provide for crediting the pro rata expense assessment obligation of a handler with such portion of his direct expenditures for *marketing promotion including paid advertising* as may be authorized by the order.

[It was testified that the order should be amended to provide for such crediting and that terms and conditions applicable to crediting handlers for direct expenditures for *marketing promotion including paid advertising* should be set forth in the administrative rules and regulations. The major responsibility for applications and justification of such credit should rest with the individual handler. It should be understood that any form of crediting that is developed

pursuant to administrative rules and regulations should not be applicable to production research or marketing research and development projects. The act only permits the development of a method for crediting direct expenditures for *marketing promotion including paid advertising*. Credits should be allowed for both brand and generic advertising, provided that such activities conform with the prescribed rules and regulations.

[It should be noted that under the proposed crediting system, a handler should not be permitted to qualify for excess credits. That is, the amount of credit a handler could claim should be limited to the amount of his own total assessment obligation designated for *marketing promotion, including paid advertising*. Consider the example in which the assessment obligation for a handler is $200 and $100 of this is earmarked for *marketing promotion including paid advertising*. If such handler spends $110 for creditable advertising, he should only be allowed credit up to the amount of his assessment attributable to *marketing promotion including paid advertising*, or in the example, $100. The remaining $10 should not be carried over into subsequent crop years nor should such excess amount be transferable to another handler. If a handler claims credit for less than that portion of his assessment obligation attributable to *marketing promotion including paid advertising*, the balance of such obligation should be due and payable to the Board. Such funds would become part of the Board's operating reserve. Such a reserve is discussed as material issue No. 8. [20,889]

. . .

[The amendment of the act applicable to paid advertising and crediting under the marketing order provides for crediting all or any portion of a handler's direct expenditures for *marketing promotion including paid advertising*. . . . [20,890]

. . .

[4. Section 981.41 is revised to read:

§ 981.41 Research and development.

(a) *General*. The Control Board, with the approval of the Secretary, may establish or provide for the establishment

> of projects involving production research, marketing research and development and *marketing promotion including paid advertising*, designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such *marketing promotion including paid advertising* as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) or credited pursuant to paragraph (c) of this section. [20,89192]]

Petitioners argue several times that the Board has created advertising guidelines that were not approved by the Secretary. Testimony reveals that the guidelines are used by the Board only to explain the provisions to the handlers. The guidelines are not intended to be substituted for the regulations and have no legal effect. The guidelines merely track the language of section 981.441 of the Order. (PX 71; Tr. 316-17)

. . . [11]

Third, Petitioners argue that section 981.441 of the Order should have been promulgated through formal rulemaking rather than informal rulemaking.[12] While Petitioners entitle this issue in their briefs as whether section 981.441 is supported by substantial evidence in the rulemaking record, Petitioners explain that they are not challenging the informal rulemaking record of section 981.441, in and of itself, as not being supported by substantial evidence. Rather, Petitioners argue that section 981.441 is inconsistent with

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[11] [The omitted material is the ALJ's discussion of his conclusion 15, which states (Initial Decision at 21):

> 15. Section 981.441 of the Order violates section 8c(10) of the AMAA because it regulates and restricts the advertising of almonds by handlers. 7 U.S.C. § 608c(10) (1989).
>
> For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, § IV.]

[12] [This is the only issue not appealed by either side.]

section 981.41 of the Order, which authorizes section 981.441, and as a result requires formal rulemaking.

Respondent argues that this issue should not be considered because Petitioners did not raise this issue in the Joint Submission of Issues To Be Decided, but first raised it in its brief. As explained earlier, all issues [would ordinarily] be considered as Respondent has not been prejudiced [, but this is jurisdictional (see § VI, Additional Conclusions by the Judicial Officer)].

. . . However, section 981.441 does not require promulgation through formal rulemaking. Formal rulemaking is not required unless specified by statute, and courts are reluctant to require anything more unless the complaining party has suffered a denial of due process. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*, 435 U.S. 519, 524 (1978).

The AMAA only requires formal rulemaking for the promulgation of the marketing order. 7 U.S.C. § 608c(3) (1988). Section 981.41 was promulgated by formal rulemaking. Section 981.441 is a regulation implementing section 981.41 and thus, only requires informal rulemaking.

Petitioners offer no argument in support of their allegation except that formal rulemaking is required because section 981.41 did not authorize section 981.441. Petitioners state that when a regulation is contradictory to the Order, it requires formal rulemaking. I disagree that section 981.441 contradicts section 981.41. In fact, Petitioners in their initial brief do not argue that the sections are contradictory.

Fourth, Petitioners argue that section 981.441 of the Order, as applied, is an unlawful delegation of authority because it permits the Board to decide what will constitute creditable advertising. A handler must submit the advertisement to the Board for approval for credit toward his advertising assessment. 7 C.F.R. § 981.441(c)(6) (1989). (Tr. 237) The Board staff makes the initial decision as to whether the advertisement is creditable. (Tr. 299, 309-10) Petitioners explain that if the advertisement is approved, the handler receives credit and the process ends. This decision is not reviewed by the Secretary or AMS. If, on the other hand, the advertisement is not deemed creditable, the handler must appeal to the Public

Relations and Advertising Committee. (Tr. 299, 309) Petitioners argue that this is unfair as the Committee is dominated by their competitors, the Blue Diamond members. If the Committee denies credit the handler may appeal to the Board. (Tr. 302) The Board is also dominated by Petitioners' competitors.

Petitioners allege that the process of approving the advertisements for credit was to be a ministerial function. Petitioners rely on the testimony of John Camou, who in 1971 was the Assistant to the President of Blue Diamond. Mr. Camou testified at the hearing held for the promulgation of section 981.41 of the Order that the process envisioned for the Board would simply be a clerical one, that the crediting rules would be clear so that there would be few questions, if any, relating to the crediting of advertisement. *In re Almond Growers in the State of California*, Docket No. AO-214-A4, Transcript, pp. 27, 53-55, 58, 60, March 17, 1971. Additionally, Petitioners emphasize that Roger Baccigaluppi, President of Blue Diamond, testified that, initially, the Board should not be faced with the problem of making value judgments on the advertisements. *Id.* at 174-75. Petitioners explain that the process is not ministerial, because the Board staff are making value judgments to determine whether an advertisement is creditable. (PX 103, 106-32, 138; Tr. 240, 305) Petitioners conclude, therefore, that the Board staff are making law when they decide what advertisements should receive credit.

. . . However, I find no unlawful delegation of authority from the Secretary to the Board. Section 981.41(c) of the Order provides in relevant part:

> (c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses.

7 C.F.R. § 981.41(c) (1989). Section 981.441 of the Order states in relevant part:

> (v) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in 981.41(c). The

> Board shall advise the handler promptly of the extent to which such claim has been allowed.

7 C.F.R. § 981.441(c)(6)(v) (1989). Thus, the Board has been given the power to administer sections 981.41 and 981.441. The Order contains guidelines for the Board to follow in making a decision. Sections 981.41 and 981.441 specifically explain what kind of advertisements will be acceptable for credit toward the assessments.

The appeal process allows the Secretary to have the final authority on what advertisements will be acceptable as credit toward the assessments. The Secretary always has the continuing right of disapproval. 7 C.F.R. § 981.40(d) (1989). As discussed earlier, delegation by the Secretary to the Board, to administer the Order, is lawful as long as the Secretary retains the ultimate authority to make decisions.

It is significant that the Petitioners have not exhausted the appeal process to determine if their advertisements were unfairly denied. This is the only way the Petitioners can hope to bring to the Secretary's attention any abuse that might be occurring by the Board.

. . . .

VI. Annual Rules Establishing the Creditable Assessment Rate.

Petitioners argue that the annual rules from 1980-89, through which the Secretary established the creditable portion of the assessments, were not supported by a substantial basis in the rulemaking record, and from 1980-86, the Secretary did [not] comply with the notice and comment provisions of the APA. Petitioners complain that each year the Secretary merely issued the rule and failed to substantiate the need for the amount requested by the Board. There was no independent analysis of the budget recommended by the Board.

Respondent explains that the assessment rate is established by an arithmetic formula. The Board establishes a budget, estimates the size of the crop, and divides one into the other to arrive at the assessment rate. The budget is then submitted to the Secretary for

approval. 7 C.F.R. §§ 981.80, .81 (1989). The Board is comprised of producers and handlers who are qualified to evaluate the Board's needs, and estimate costs of goods, services and personnel. Respondent also notes that from 1981-88 the budget rate vote was unanimous each year and the creditable assessment rate vote was unanimous in eight of the nine years. (RX 2)

The annual rules from 1980-89 were supported by substantial evidence in the rulemaking record. (PX 40, 41, 48, 61, 62, 63, 77, 78, 79, 80, 82, 95, 98, 99; RX 44, 69, 74, 87, 94, 95, 96, 97, 98, 99, 100, 103, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 117, 119, 120, 122, 123, 124, 125, 126, 131, 132, 133, 138, 139) The Secretary in his rulemaking capacity is required to make policy decisions. Petitioners must demonstrate that those decisions were arbitrary and capricious and not supported by evidence in the record. Petitioners have not met that burden. The Secretary had before him Board meeting minutes, transcripts, and AMS field agent reports. The record for each year was ample and sufficient for the Secretary to determine whether the budgets should have been approved. Further, since the assessment rate is determined by an arithmetic formula, there is little room for discussion.

. . . .[13]

VIII. [Misnumbered] Assessment on Reserve Almonds.

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[13] [The omitted material is the ALJ's discussion of his conclusions 19 and 20, which state (Initial Decision at 21, 22):

19. The Secretary should have allowed notice and comment pursuant to the APA on the annual rules from 1980-86, establishing the creditable assessment rate, as the rules had a substantial impact upon the handlers. 5 U.S.C. § 553 (1988). (RX 94, 96, 103, 106, 110, 115, 119)

20. The rules imposing the assessment rate from 1980-88, that were promulgated after the handling of almonds had begun for that crop year, were retroactive in effect and therefore invalid. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988); *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-5 and 981-6, March 19, 1990. (RX 94, 96, 103, 106, 110, 115, 119, 125, 126, 132, 133, 136, 137)

For the Judicial Officer's contrary conclusions, see Additional Conclusions by the Judicial Officer, §§ V, VI.]

Section 981.81 of the Order provides that a handler must pay an assessment on almonds "received by him for his own account." 7 C.F.R. § 981.81(a) (1989). Section 981.10 defines "almonds received for his own account" as follows:

> "Almonds received for his own account" means all almonds which are received by a handler (including all almonds of his own production), except those which are received by him for storage or processing for the account of any other person and with respect to which such handler performs no handling function.

7 C.F.R. § 981.10 (1989).

Petitioners argue that the assessments of almonds held in reserve pursuant to section 981.81 of the Order are not in accordance with law. Petitioners contend that there should not have been an assessment on reserve almonds, because reserve almonds are not held for the benefit of the handler. The reserve almonds are held for the benefit of the Board and the AMAA states that handlers should not be held responsible for expenses of the Board in receiving, handling, holding or disposing of almonds. Section 10(b)(2)(ii) of the AMAA provides in relevant part:

> (ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, *other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order*. . . .

7 U.S.C. § 610(b)(2)(ii) (1988) (emphasis added).

As Respondent argues, the assessment on reserve almonds was in accordance with law. Before a handler can assign almonds to his reserve obligation, he must first receive them. It is the handler's receipt of the almonds that activates the requirement of section 981.81. A handler's almonds are produced by him [or otherwise received by him] before they become reserve almonds. Section 981.10 defines almonds held for the account of the handler to include all almonds received by him, encompassing all almonds of his own production. Therefore, the assessment was not on almonds held for the account of the Board, but was on almonds received by the handler, which may have subsequently been held for the account of the Board. Thus, section 10(b)(2)(ii) of the AMAA is not implicated.

If section 10(b)(2)(ii) of the AMAA were implicated, the assessment would still be appropriate. The language explains that handlers must pay their pro rata share of the expenses of the Board, except expenses incurred in receiving, handling, holding or disposing of almonds by the Board for the benefit or account of persons other than handlers subject to the Order. Petitioners are handlers subject to the Order, thus they would not be exempt from paying their pro rata share of the costs of the Board.

[In addition, even if the Secretary were not permitted by the Act and Order to include reserve almonds in the assessment computation, it would not lower a handler's assessment. The Act and Order require that the assessment rate produce the amount of money needed to fund all the expenses of the Board (7 U.S.C. § 610(b)(2)(ii); 7 C.F.R. § 981.81(a)). If the Secretary were not permitted to include reserve almonds as part of the size of the crop to be divided into the budget amount, the assessment rate would be higher than under the present procedure (since a smaller number of almonds would be meeting the identical budget needs). This higher rate, applied only to the saleable portion of each handler's almonds, would have to produce the same amount of money as the lower rate (under the present procedure) applied to all of the almonds received by a handler (including almonds that later become reserve almonds).]

IX. The First Amendment.

Petitioners argue that the creditable portion of the assessment obligation of sections 981.41, 981.81 and 981.441 of the Order violate their rights of free speech and association under the First Amendment of the United States Constitution. U.S. Const. amend. I. While Petitioners cite both cases dealing with compelled speech and association and cases dealing with content-based regulations, their argument is that their First Amendment rights are violated by compelled speech and association. As a result, this is the issue that I will review. It should be noted that the [appropriate test for government regulation which impinges on commercial free speech is set forth in *State University of New York v. Fox*, 492 U.S. 469, [109] S. Ct. 3028, 3034-35 (1989). That test requires only that the government regulation bear a reasonable "fit" to the government's important interest.[14] Specifically, the Court stated in *Fox* (109 S. Ct. at 3034-35):

> [In sum, while we have insisted that "'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,'" *Shapero* [v. *Kentucky Bar Assn.*], 486 U.S., at [478], 108 S. Ct., at 1924 (1988), quoting *Zauderer*, 471 U.S., at 646, 105 S. Ct., at 2279, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas [de Puerto Rico Assoc. v. Tourism Company of Puerto Rico]*, 478 U.S., at 341, 106 S. Ct. at 2977, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the

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[14] [The ALJ stated (Initial Decision at 84):

It should be noted that the standard used if a regulation is found to be content-based is the same as the standard applied in this case to the compelled speech and association arguments, the compelling state interest standard. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987); *Bullfrog Films, Inc.* v. *Wick*, 847 F.2d 502, 511 (9th Cir. 1988).]

> interest served," *In re R.M.J., supra*, 455 U.S. [191], at 203, 102 S. Ct., at 937 [(1982)]; that employs not necessarily the least restrictive means but, as we have put it in other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.]

Relying on *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), Petitioners argue that their associational rights are violated because they are required to pay an advertising assessment or in the alternative, to advertise pursuant to section 981.441 of the Order and receive credit toward their assessment. In *Abood*, the Supreme Court found that state laws allowing management and unions to enter into "agency shop" agreements where every employee, as a condition of employment, paid the union a service charge equal in amount to union dues, infringed upon the employee's right to be free from compelled speech and association. A portion of the dues collected were spent for political purposes with which the plaintiffs disapproved. The Court determined that the compelled contributions paid to private groups engaging in First Amendment activities implicated the First Amendment rights of the plaintiffs. *Id.* at 222. As long as the dues were used to finance expenditures by the union for collective-bargaining, contract-administration and grievance adjustment purposes there was no First Amendment violation, but plaintiffs could not be compelled to contribute for political activity with which they disagreed. *Id.* at 225-26, 234-35; *Accord, Int'l Assn of Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225 (1956).

Petitioners complain that they are ideologically opposed to the advertising program and that they are being forced to spend their own money to disseminate the views of Congress, the Almond Board, and Petitioners' major competitor, Blue Diamond.

Respondent argues that the Order does not force the Petitioners to advertise almonds. Petitioners have the choice to simply pay the assessment directly to the Board, rather than advertise and seek credit. Additionally, section 981.441 only specifies the kind of advertisement that must be done to receive credit, and does not compel the handlers to advertise only in this manner. Handlers are

free to advertise anything they want, but may not receive credit for it if it does not meet the requirements of section 981.441.

Respondent explains that *United States* v. *Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, _____ U.S. _____, [110] S. Ct. 1168 (1990), is applicable and dispenses with the issue. The Beef Promotion and Research Act at issue in *Frame* was based on the AMAA and is therefore similar. *Frame*, 885 F.2d 1119.

The court held in *Frame* that the advertising program established by the Beef Promotion and Research Act did not violate the First Amendment rights of the. cattle producers. The court characterized the speech at issue as commercial speech. The court explained that the beef act could only be sustained constitutionally if the government could demonstrate that the act was adopted to serve compelling state interests, that were ideologically neutral, and that could not be achieved through means significantly less restrictive of free speech and associational freedoms. *Id.* at 1134. The court applied the higher standard of review because it found that the associational rights of the cattle producer were implicated based on *Abood*. *Id.* at 1131-34. The court explained that "the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity." *Id.* at 1132. The funding scheme at issue where the cattle producer paid an assessment of $1.00 per head of cattle was similar to the required dues in *Abood*, "with its close nexus between the individual and the message funded." *Id.*

The court concluded that the government interest was of such importance to justify the slight incursion on the cattle producer's associational and free speech rights:

> That the interest advanced by the Beef Promotion Act is primarily economic does not diminish its importance. For example, the establishment of industrial harmony — although an "economic" interest — is sufficiently important to justify significant intrusions on the employees right to associate. . . . Widespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether. . . . A continuation of this trend would endanger not only the country's meat supply,

> but the entire economy. . . . The Act also furthers important non-economic interests. Maintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life. . . .

Id. at 1134-35 (citations omitted). The assessments provide for achieving both the economic and non-economic goals of the beef act. *Id.* The court compared the intrusion upon the cattle producer's rights with the intrusion found in the union shop agreement cases and determined that the intrusion here was slight in comparison:

> The Cattlemen's Board is authorized only to develop a campaign to promote the product that the defendant himself has chosen to market. Thus, the Cattlemen's Board is authorized only to engage in commercial speech on behalf of producers. Unlike the union, the Board will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests, such as negotiation of wage increases, medical benefits, and limitations on the right to strike.
>
> Furthermore, in *Ellis* v. *Brotherhood of Ry. Clerks,* 466 U.S. 435 [1984], the Court explicitly recognized that spending for non-political purposes burdens first amendment rights less significantly than does spending for other purposes.

Id. at 1136. The court also noted that "the individual cannot withdraw his support merely because he disagrees with the group's strategy." *Id.* (citing *Abood*, 431 U.S. at 223 (quoting *Street*, 367 U.S. 778)).

> . . . Petitioners' First Amendment arguments question the constitutionality of the advertising program as a whole and not exclusively section 981.441. In applying the analysis used by the court in *Frame*, [if that were the proper standard of review,] I find that Petitioners first amendment rights are implicated, but that the government has a compelling state interest, that is ideologically neutral, and that cannot be achieved through less restrictive means. Both parties agree that the speech at issue is commercial speech.

The government's interest here is to promote the sale, consumption, and use of California almonds. The Order was instituted to rescue an already deteriorating almond industry:

> Almond production in California has increased sharply from an annual average of 12,380 tons during 1931-35 to an average of 33,440 tons during 1945-49. In 1949, a record crop of 39,000 tons was produced. This upward trend in production is expected to continue, since the acreage of trees which have not yet reached bearing age is more than enough to maintain present bearing acreage and is planted mainly in high yielding districts, also due to improved cultural practices, per acre yields have increased. Crops of 50,000 tons may reasonably be expected in the near future. The upward trend in production of almonds and other domestic tree nuts and the high level of tree nut imports, which compete with almonds in domestic markets, are expected to result in even more acute almond marketing problems in the future than those which now exist.
>
> . . . .
>
> During the past two seasons, some growers' costs of producing almonds exceeded the prices which they received. As a result, some orchards are being neglected, and in some instances, trees have been pulled out. The uncertainty as to the future has also retarded the replacement of equipment, which, in itself, tends to raise production costs. There are approximately 8,800 almond growers in California who are dependent, to varying degrees, upon the income from their almond orchards for their living and operating expenses. Unless corrective measures, including the program proposed herein, are put into effect promptly, it seems probable that the present economic situation in the almond industry will become worse.

15 Fed. Reg. 3623, 3624 (1950). Section 981.41 was [originally] added to the Order [in 1970] to "provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of almonds." 35 Fed. Reg. 7428, 7432 (1970). There is a need to stimulate the demand for almonds. The purpose of the marketing

promotion [including paid] advertising program [, proposed in 1971 as an amendment to § 981.41, and promulgated in 1972,] is to enhance returns to producers. 36 Fed. Reg. 20,887, 20,889 (1971). Like the beef act in *Frame*, the Order was enacted for economic and non-economic reasons. The Order was necessary to rescue the almond industry. The costs of producing were outweighing the profits received by handlers. The Order regulates the quantity of almonds that can be marketed, in order to stabilize the industry and provide for the best return to the handlers. The Order also ensures that the handlers will be able to stay in business and continue their livelihood. The advertising program provides a necessary end to achieving the goals of the Order, by promoting the sale, use and consumption of almonds. As in *Frame*, the intrusion here is slight compared to the union shop agreement cases, and is justified by the governmental interest of preserving the almond industry. Therefore, the Order is ideologically neutral. (Tr. 431)

X. Taxing Power of Congress.

Petitioners argue that the creditable portion of the assessment obligation amounts to a tax and is an unconstitutional exercise of the taxing power granted to Congress. U.S. Const. art. I, § 8, cl. 1. Petitioners contend that the power to collect assessments is an unlawful delegation of authority by Congress because they failed to specify any guidelines.

Respondent argues that the assessment is not a tax, but rather a lawful delegation by Congress of its commerce powers, and assuming that the assessment is a tax, the delegation is still lawful. Respondent explains that Congress' delegation of authority to the Secretary to promulgate assessment regulations was a proper exercise of authority under the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. Section 8c(l) of the AMAA provides:

> (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this

> section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. § 608c(l) (1988). This section of the AMAA reflects the intent of Congress to invoke its commerce powers.

In *Frame*, it was explained that earlier in the litigation, the defendant had argued that the assessments on beef constituted a tax, but the parties eventually agreed that in enacting the Beef Promotion and Research Act, Congress was exercising its power under the Commerce Clause. *Frame*, 885 F.2d at 1125 n. 4. The court of appeals explained that Congress' intent to delegate authority pursuant to the Commerce Clause was reflected in the [Act's finding] that "'beef and beef products move in interstate and foreign commerce,' or 'directly burden or affect interstate commerce of beef and beef products,' 7 U.S.C. § 2901(a)." *Frame*, 885 F.2d at 1125. This language is similar to the language in section 8c(l) of the AMAA.

The district court dealt with the issue that the assessment was an unlawful delegation of Congress' taxing power. The court explained that since 1935, no statute had been found to be an unlawful delegation of legislative authority. The court found that the Beef Promotion and Research Act provided the significant terms and conditions, and left little discretion to the Secretary. *United States* v. *Frame*, 658 F. Supp. 1476, 1479 (E.D. Pa. 1987).

Respondent explains that the Supreme Court reviewed an unlawful tax challenge in *Skinner*, 109 S. Ct. 1726, and found that the challenged delegation was lawful. The Court found that the Constitution places no stricter requirement on Congress in delegating its authority under the taxing power than it does in delegating its authority under the commerce power. *Id.* at 1733. The Court then applied the non-delegation standard:

> Earlier this Term, in *Mistretta*, 488 U.S. [361], we revisited the non-delegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such

> that a court could "'ascertain whether the will of Congress has been obeyed,'" no delegation of legislative authority trenching on the principle of separation of powers has occurred. . . . (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. . . .")

Id. at 1731 (citation omitted).

Respondent concludes that there has been no unlawful delegation of authority. The *Frame* court held that the Beef Promotion and Research Act, which is modeled after the AMAA, did not unlawfully delegate authority to the Secretary. *Frame*, 885 F.2d at 1128. The limitations placed on the Secretary are similar to those the Court highlighted in *Skinner* as why there was no unlawful delegation of authority. The Secretary may not collect assessments from any person not regulated under a marketing order (7 U.S.C. § 608c(10) (1988)); he may not use promotional funds for anything that does not effectuate the declared policy of the Act (7 U.S.C. § 602(3) (1988)); and he must apply a uniform assessment to all handlers regulated under the Order (7 U.S.C. § 608c(10) (1988)).

For the reasons stated by Respondent, I find that there was no unlawful delegation of authority by Congress to the Secretary. Petitioners argue in their reply brief that the court in *Frame* found that the most important aspect in determining that there was no unconstitutional delegation of authority was that Congress specified the assessment in the Act at $1.00 per head of cattle. *Frame*, 885 F.2d at 1128. While the court found it important, it was not solely determinative as to whether there was an unlawful delegation of authority. In fact, the court states that under the Beef Promotion and Research Act, "Congress has delegated far less discretion than the Supreme Court has previously sanctioned in applying the non-delegation doctrine. . . ." *Id.* (citations omitted). The Judicial Officer in *Sequoia Orange*, 47 [Agric. Dec.] at 184, explained that "[L]egislative standards far less specific than those contained in the present Act [AMAA] have been held to state a sufficiently definite

standard for administrative action." The AMAA does [not][15] unlawfully delegate authority to the Secretary.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALXs conclusions with which I disagree are discussed seriatim, followed by a discussion of petitioners' appeal, with which I disagree.

I. It Was Neither Necessary nor Desirable for the Secretary to Promulgate Regulations for the 1984-85 and 1985-86 Crops, Specifying the Percentage of the Reserve to Be Used in the Market Development Program for Almond Butter and School Lunches.

The ALJ held that it was fatal error for the Secretary to fail to specify in the regulations for 1984-85 and 1985-86 the percentage of the reserve to be used in the Market Development Program for Almond Butter and School Lunches (Program), stating (Initial Decision at 47-49):

> Second, Petitioners argue that for the crop years 1984-85 and 1985-86, the Secretary erred by failing to specify in the final rules the percentage of the reserve to be allocated to the Program. The Secretary stated in the final rule for 1984-85:
>
> > The remaining 25 percent (123.5 million pounds) of the 1983 marketable supply must be withheld by handlers to meet their reserve obligations. The Board plans to allocate a small portion of these almonds for use chiefly in the almond butter and school lunch projects begun during the 1982-83 crop year.

(RX 36) In the final rule for 1985-86 the Secretary stated: "The remaining 20 percent (94 million pounds) of the 1985 crop marketable production must be withheld by handlers to meet their reserve obligations." (RX 67)

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[15] [The ALJ's omission of "not" was an obvious typographical error.]

The Secretary was in error by not specifying the percentage of the reserve allocated for the Program for the marketing years 1984-85 and 1985-86. For these years, the Secretary merely stated the total percentage of the reserve without a discussion of how the reserve was to be allocated. The reserve was a substantial increase from the prior years. The Secretary should have included the specific allocation of the reserve in the proposed rule to allow notice and comment on the intended use of the reserve. The Secretary, also, should have included the breakdown in the final rule. Certainly, the allocation of reserve had a substantial impact upon the rights and interests of the handlers and should have been promulgated through APA rulemaking. As a result of the Secretary's failure to follow the APA, the regulations are invalid. *Buschmann* v. *Schweiker*, 676 F.2d 352, 355-56 (9th Cir. 1982).

Petitioners argue in their reply brief that the Board was making law. As explained, Petitioners argue that for the crop years 1984-86, the Secretary did not specify the amount of the reserve to be used for the Program.

Respondent argues that the Secretary made no decision as to the amount of almonds held in reserve that would be used for almond butter. Respondent explains that the Order establishes the permissible uses of reserve almonds in section 981.66(c):

> (c) *Exclusion from salable normal trade channels.* No reserve almonds shall be sold in the United States, Puerto Rico, and the Canal Zone other than to governmental agencies or to charitable institutions for charitable purposes, except for diversion into almond oil, almond butter, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets.

7 C.F.R. § 981.66(c) (1989).

Petitioners claim that if it is true that the Secretary did not determine the amount of reserve to be allocated to the program, then the Board did, and, as a result, the Board was making law.

The Board was not making law. There was no unlawful delegation of authority to the Board. While the Secretary was in error for not specifying in the rule the allocation of the reserve to the Program, the Board was not operating without any supervision.

Respondent explains that the Secretary did not specify the breakdown of the reserve, but ends his argument here. All section 981.66(c) provides for is the exclusion of reserve almonds from normal trade channels and does not speak to the reserve percentage. In a later argument in its brief, Respondent states that the Secretary established the reserve requirement to be used for the Program, and that each handler must withhold that percentage. Then Respondent explains that a handler was required to turn over that percentage of almonds to the Board, or a handler could have signed an agency agreement and disposed of the required percentage into almond butter or other non-competitive outlets for the Board. 7 C.F.R. § 981.67 (1989). (PX 38; RX 34, 65, 85) Yet, Respondent never explains where the Secretary established the reserve percentage to be allocated to the Program.

It appears from the evidence that the Secretary approved of the amount of the reserve to be allocated to the Program by approving the salable and reserve percentages. (Tr. 459-61) Thus, the Board was not establishing the amount of the reserve percentage to be allocated to the Program. The Board would recommend the percentage to the Secretary and await approval. While, it appears that the Secretary was aware of the percentage of the reserve being allocated to the Program, as outlined above, the Secretary should have specified the allocation of the reserve for the Program in the final rule for the marketing years 1984-85 and 1985-86.

The ALJ's decision as to this issue overlooks the fact that the reserves were established for the 1984-85 and 1985-86 crops for the purpose of supply management, in view of the huge surplus expected during each of those years. As shown in note 7, *supra*, the estimated surpluses for the 1982-83 and the 1983-84 crops were two percent and three percent, respectively. However, for the 1984-85 and 1985-86 crops, the estimated surpluses were 25 percent and 20 percent, respectively, requiring the establishment of the reserves irrespective of any considerations as to the Program for almond butter and school lunches. Specifically, the statistics set

forth in the Secretary's final rules for the 1984-85 and 1985-86 crops are as follows (RX 36, 67):

fact that the reserves were established for the 1984-85 and 1985-86 crops for the purpose of supply management, in view of the huge surplus expected during each of those years. As shown in note 7, *supra*, the estimated surpluses for the 1982-83 and the 1983-84 crops were two percent and three percent, respectively. However, for the 1984-85 and 1985-86 crops, the estimated surpluses were 25 percent and 20 percent, respectively, requiring the establishment of the reserves irrespective of any considerations as to the Program for almond butter and school lunches. Specifically, the statistics set forth in the Secretary's final rules for the 1984-85 and 1985-86 crops are as follows (RX 36, 67):

	1984-85 Crop Million Pounds	1985-86 Crop Million Pounds
Carryover from Prior Year Est. Production	91.8	228
	494.0	470
Total Supply	585.8	698
Est. Demand	380.0	400
Est. Year-end Carryover	82.3	204
Demand + Year-end Carryover	462.3	604
Est. Surplus	123.5 (25% of Est. Prod.)	94 (20% of Est. Prod.)

Hence, considering the total estimated supply and demand situations, there was an estimated 25% surplus for the 1984-85 crop (123.5 ÷ triangle ÷ 494 = .25) and an estimated 20% surplus for the 1985-86 crop (94 ÷ triangle ÷ 470 = .20)[16]

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[16] The same result is reached if we follow the formula set forth in the Order, which directs the Secretary to "give consideration to the ratio of estimated trade demand (either domestic or domestic plus export, less the handler carryover available to satisfy trade demand plus the desirable handler carryover at the end of the crop year) to the estimated production of marketable almonds" (7 C.F.R. § 981.47). For example, for the 1984-85 crop, if we take the "estimated trade demand" (380), less the "handler carryover available to satisfy trade demand" (91.8), plus the "desirable

The Secretary's original final rule for the 1984-85 crop, published after a notice-and-comment period had been published in the Federal Register, explained the necessity for the 25% reserve, as follows (RX 36, 49 Fed. Reg. 38,530 (1984)):

> **SUMMARY:** This final rule establishes salable, reserve, and export percentages of 75 percent, 25 percent, and 0 percent, respectively, for marketable California almonds delivered to handlers during the 1984-85 crop year, which began July 1, 1984. This action is taken under the marketing order for almonds grown in California and is designed to promote orderly marketing conditions in view of an estimated record large 1984 almond crop.
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> . . . .
>
> The remaining 25 percent (123.5 million pounds) of the 1983 marketable supply must be withheld by handlers to meet their reserve obligations. The Board plans to allocate a small portion of these almonds for use chiefly in the almond butter and school lunch projects begun during the 1982-83 crop year. These long-term projects are a means for the industry to develop new markets for almonds in view of larger crops. Allocated reserve almonds also could be disposed of in other noncompetitive outlets as specified in the order or approved by the Board.
>
> . . . .
>
> The order permits the Board to include normal export requirements with domestic requirements in its estimate of trade demand when recommending the establishment of salable, reserve, and export percentages for any crop year. For the 1984-85 crop year, estimated exports are included in trade demand, thereby making export a salable outlet rather

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handler carryover at the end of the crop year" (82.3), we have a figure of 370.5 (380-91.8 + 82.3 = 370.5). The ratio of that figure (370.5) to the "estimated production of marketable almonds" (494) is .75 (370.5 ÷ triangle ÷ 494 = .75), or 75%. So the saleable percentage would be 75% and the reserve percentage would be 25%, which is the same result arrived at by my calculations set forth immediately above.

than a reserve outlet. Because of this action, no portion of the reserve will be eligible for export to normal outlets. Thus, an export percentage of 0 is established.

. . . .

The objective of the order's volume regulation provisions is to establish and maintain orderly marketing conditions for all California almonds. This action will help to stabilize supplies and prices as the industry faces its largest crop in history — a crop estimated to be 27.8 percent greater than the 1981 record crop of 407 million pounds and 114.9 percent greater than the small 1983 crop of 242 million pounds.

Similarly, the Secretary's original final rule for the 1985-86 crop, published after a notice-and-comment period had been published in the Federal Register, explained the necessity for the 20% reserve, as follows (RX 67, 50 Fed. Reg. 35,768 (1985)):

SUMMARY: This final rule establishes salable, reserve, and export percentages of 80 percent, 20 percent, and 0 percent, respectively, for marketable California almonds delivered to handlers during the 1985-86 crop year, which began July 1, 1985. This action is taken under the marketing order for almonds grown in California and is designed to promote orderly marketing conditions in view of a projected record large almond supply for the 1985-86 crop year.

. . . .

The remaining 20 percent (94 million pounds) of the 1985 crop marketable production must be withheld by handlers to meet their reserve obligations. Authorized outlets for reserve almonds include new uses and markets for almonds such as almond butter, the school lunch program, an almond paste made from unblanched almonds, sales of almond snack packs to airlines and hotels at reduced prices with the agreement that these organizations would give away the snack packs to their customers on a complimentary basis, an [sic] various fund raising promotions. Such market development is necessary in view of the current supply situation and anticipated large crops in future years. Reserve almonds also could be disposed of in

other noncompetitive outlets as specified in § 981.66(c) of the order or as approved by the Board.

. . . .

The objective of the order's volume regulation provisions is to establish and maintain orderly marketing conditions for all California almonds. This action will help to stabilize supplies and prices as the industry faces its second largest crop in history on the heels of last year's record large crop of 587 million pounds. This year's total marketable supply (1985 crop marketable production plus salable carry in from the 1984 crop is projected at a record 698 million pounds — 6.6 percent above last year's previous record of 654.5 million pounds. World production also is expected to set a record, and sales of California almonds in export are expected to be difficult due to unfavorable exchange rates and large projected crops in Spain and Italy. Thus, California faces strong competition for export markets.

Accordingly, the identical reserves would have been established for the 1984-85 and 1985-86 crops, irrespective of any considerations relating to the Program for almond butter and school lunches. It was neither necessary nor desirable for the Secretary to specify, by regulation, either a maximum or minimum number of almonds to be available for the Program.

In this respect, it is significant that the Order specifies the only allowable uses for reserve almonds, one of which is for almond butter. The Order states (7 C.F.R. § 981.66) (emphasis added):

§ 981.66 Conditions governing disposition of reserve.

(a) *General*. The *Board shall have power and authority to sell or dispose of any and all reserve almonds withheld* upon the best terms and at the highest return obtainable consistent with the ultimate complete disposition of reserve, subject to all conditions of this section.

. . . .

(c) *Exclusion from salable normal trade channels*. No reserve almonds shall be sold in the United States, Puerto Rico, and the Canal Zone *other than to governmental agencies*

or to charitable institutions for charitable purposes, *except for diversion into* almond oil, *almond butter*, poultry or animal feed, or into other channels which the Board finds are noncompetitive with existing normal markets for almonds, and with proper safeguards in each case to prevent such almonds thereafter entering the channels of trade in such normal markets.

Hence, in view of the provisions of the Order and the supply-demand conditions for the 1984-85 and 1985-86 crops, it was not *necessary* to establish a specific reserve for almond butter, or to specify the amount of the much larger reserve (created for supply-management purposes) that was expected to be used for almond butter. Furthermore, in view of the newness of this Program, it was not even *desirable* to specify by regulation, in 1984 or 1985, an almond-butter reserve, either by way of a minimum or a maximum percentage.

Assuming that the Secretary erred by failing to establish by regulation the amount of the reserve to be used for almond butter (which is not the case), no monetary damages could be awarded to petitioners. As stated in *In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705, slip op. at 69-75 (July 9, 1990), *appeal docketed*, No. CV F 90-473-EDP (E.D. Cal. July 27, 1990) (reproduced herein without the customary, further indentation):

EXCERPT FROM WILEMAN I

C. The Act Does Not Authorize the Award of Monetary Damages.

Under the plain terms of the Act, a handler's petition under § 8c(15)(A) of the Act is limited to "stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law *and praying for a modification thereof or to be exempted therefrom,*" and the Secretary is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A) (emphasis added)). There is no authorization in the Act, the Marketing Orders, or the Rules of Practice for consequential damages (as distinguished from a return of monies paid) to be awarded in § 8c(15)(A) proceedings. In over 50 years of proceedings under this Act, consequential damages have never

been awarded. Petitioners and the ALJ attempt to distinguish fruit and vegetable orders from milk orders by contending that the latter orders only involve monies paid, and never consequential injury. This allegation is incorrect. For example, a milk supply plant might well suffer only consequential damages from a pooling provision that required an unlawfully high percentage of its milk to be delivered to distributing plants. Nonetheless, no case has ever been decided under milk orders or fruit and vegetable orders which would allow for consequential damages.

There have, of course, been some milk cases in which, as a result of a determination that an obligation to pay money imposed on a milk handler by a Market Administrator was unlawful, refunds have been made to the handler. See, *e.g.*, *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 59 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988). But even "where a handler has been awarded money in a § 8c(15)(A) proceeding, interest [i.e., consequential damage] has never been awarded." *Id.* at 60.

Furthermore, even though an obligation unlawfully imposed on a milk handler might permit a return of the money unlawfully exacted from the handler, the general practice in this Department is first to give the Secretary the opportunity, in his rulemaking capacity, to correct the error, retroactively. As stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, slip op. at 71-73 (Apr. 12, 1990), *appeal docketed*, CIV-90-688 T (W.D. Okla. May 1, 1990):

> Since I am dismissing the petition, it is unnecessary for me to rule on what relief would have been appropriate if the petition were not dismissed. However, if the petition were not dismissed, I would have remanded the proceeding for the Secretary to determine the appropriate remedy in his legislative capacity, for the reasons set forth in Respondent's Appeal Petition at 36-69, attached as Appendix B, and Respondent's Reply Brief filed Oct. 11, 1988, at 5-7, attached as Appendix C. (These excerpts from respondent's briefs will not be published in Agriculture Decisions, since it is not necessary for me to decide this issue.)

As stated in *In re Baker & Sons, Dairy, Inc.*, 48 Agric. Dec. 818, slip op. at 66-67 (Sept. 22, 1989), *appeal docketed sub nom.*

Meadow Gold Dairies, Inc. v. *Yeutter,* No. 89-543-JJF (D. Del. Oct. 10, 1989):

VI. If the Secretary's Temporary, Emergency Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.

If the Secretary's temporary, emergency rule-making action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioners. See *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 57-62 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988);[8] *In re Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38 Agric. Dec. 1061 (1979),[9] *dismissed per settlement agreement*, 40 Agric. Dec. 1711 (1979); *In re Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

In some cases, courts have remanded proceedings for further administrative consideration. See, *e.g.*, *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had

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[8] In *Defiance*, the Judicial Officer recognized that some courts had awarded monetary relief to some handlers, but the Judicial Officer did not adopt that policy as the proper Departmental policy.

[9] In *In re Borden, Inc.*, 38 Agric. Dec. 1061 (1979) (remand order), the Judicial Officer remanded the proceeding to the ALJ to determine the damages [i.e., the return of money paid by the handler]. But that remand order does not reflect the Department's customary practice, since the remand order related to two related proceedings, one of which was controlled by a court decision holding that Borden was entitled to recover overpayments from the producer-settlement fund. *Borden, Inc.* v. *Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976).

limited himself to statutory authority); *American Dairy of Evansville, Inc.* v. *Bergland, supra*; *Rodway* v. *USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, *e.g.*, *Blair* v. *Freeman*, 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc.* v. *United States*, 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States* v. *Morgan*, 307 U.S. 183, 185-98 (1939).

In *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 57-59 (1985), *aff 'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff 'd*, 857 F.2d 1065 (6th Cir. 1988), referred to in the preceding quotation, it is stated:

> III. If the Secretary's Temporary Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.

After concluding that it was unlawful for the Secretary to refuse to adopt petitioner's proposal, the ALJ ruled (Initial Decision at 28):

> The result of the Secretary's action was that petitioner was required to pay 40 cents per hundredweight more for producer milk than its competitors marketing other Class III products. The proper remedy in such circumstances is for the Market Administrator of Order 33 to reimburse petitioner the amount of this

In the first place, petitioner was not required to pay more for milk than its competitors making evaporated milk or any of the other 14 products remaining in Class III. Only handlers making butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) benefited from the temporary price reduction.

All handlers of the 15 products remaining in Class III, including other handlers making evaporated milk, continued to pay the same basic formula price previously set by a valid rulemaking proceeding.

But even if the Secretary's rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioner.

If, for example, the Secretary's temporary rulemaking action were held unlawful because the Secretary failed to explain in his rulemaking decision that he was actually reclassifying milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in a new Class III(A), priced 40¢ less than the basic formula price applicable to Class III, the obvious remedy would be for the Secretary to amend his findings and conclusions, which would eliminate the illegality.

If, on the other hand, it were held (i) that substantial evidence does not support putting butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A), or (ii) that it is unlawful to include butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A) without also including evaporated milk, the Secretary might (a) want to hold a new hearing to determine *nunc pro tunc* what temporary action should have been taken (which could take anyone of numerous forms), (b) acquiesce in the determination of illegality and annul the temporary rulemaking action as to all handlers, or (c) include evaporated milk (and perhaps other products) in the temporary, new Class III(A). There would be no basis for binding the Secretary to take only one action, *viz.*, include evaporated milk, but none of the other 14 products that would remain in Class III, in the new Class III(A).

Where it has been administratively determined that the Secretary's rulemaking action is unlawful, it has been the practice in this Department for more than 40 years to remand the proceeding to the Secretary, rather than for the ALJs or the Judicial Officer to take corrective rulemaking action. See, *e.g.*, *In re Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38

Agric. Dec. 1061 (1979), *dismissed per settlement agreement*, 40 Agric. Dec. 1711 (1979); *In re The Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc.* v. *Bergland*, 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

Even during the period prior to 1980, when the delegation of authority to the Judicial Officer included authority to perform "any regulatory function" (7 C.F.R. § 2.35 (1979)), which is not now in the Judicial Officer's delegation of authority (7 C.F.R. § 2.35 (1984)), in actual practice, the Judicial Officer always refrained from exercising any rulemaking function. Flavin, "The Functions of the Judicial Officer, USDA," in 26 Geo. Wash. L. Rev. 277, 278 n.9 (1958) (written by the Department's Judicial Officer from 1942 to 1972).

In similar situations, courts also frequently remand proceedings for further administrative consideration. See, *e.g.*, *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc.* v. *Bergland*, *supra*; *Rodway* v. *USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, *e.g.*, *Blair* v. *Freeman*, 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc.* v. *United States*, 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States* v. *Morgan*, 307 U.S. 183, 185-98 (1939).

Courts have, however, awarded relief to prevailing parties in some cases distinguishable from the present case. In *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971), a handler challenged the 1965 promulgation of a higher Class I price applicable to its plant location and requested a refund of the difference between the pre-1965 price and the higher price it had been forced to pay between 1965 and 1968 as a result of the amendment. *Id.* at 766 n. 16. The court set aside the amendment because the rulemaking record did not contain substantial evidence to support it. *Id.* at 767. The court concluded that the plaintiff was entitled to recover the "overpayments which it made pursuant to this invalid Order." *Id.* at 773.

In *Fairmont Foods*, the court held that the handler should only have paid the price set by the valid Order provision which preceded the invalid amendment, and that the "overpayments" should be returned to the handler. In the present case, however, the price petitioner paid for milk in June and July 1983 was the same price it had been paying which had been set by a valid Order provision not even challenged in this proceeding. There is no prior, valid price to revert to, as in *Fairmont Foods*, because the prior, valid price is the one which petitioner paid in this case.

Similarly, in *Borden, Inc.* v. *Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976), and *Abbotts Dairies Division of Fairmont Foods, Inc.* v. *Butz*, 584 F.2d 12, 16-21 (3d Cir. 1978), handlers challenged order amendments which raised the Class I price for their milk above the level at which it had been previously set. The courts found insufficient evidence for the amendments, and, therefore, held that they were invalid. The handlers' recoveries were based on the fact that they had paid a price set by invalid Order provisions. But, as stated above, here petitioner's price for milk was set by a prior, valid Order provision. Accordingly, those cases are not analogous to the situation here.

In the present case, if the Secretary's temporary, rulemaking action were held unlawful, I would adhere to the Department's settled practice for over 40 years, and remand the proceeding to the Secretary for further legislative consideration. That action is particularly appropriate here in view of the numerous, reasonable

options available to the Secretary, if his original, temporary action were held invalid.

Similarly, in *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 191 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc.* v. *Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), it is stated:

> Finally, even if petitioners had properly made a case as to the omission of alternative views (which they did not), and I believed such an omission to be legal error (which I do not), rather than hold invalid those weekly volume regulations where petitioners proved their case, in this respect, I would have remanded the matter to the Division Director to make a determination at the present time as to whether the additional information would have altered the regulation for the week in question. *See Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619-23 (1944); *In re Oak Tree Farm Dairy, Inc.*, 38 Agric. Dec. 113, 165-66 (1979) (decision on remand), *aff'd*, 544 F. Supp. 1351 (E.D.N.Y. 1982).

However, irrespective of whether the Secretary should be permitted to correct an error retroactively, where error has been found in a § 8c(15)(A) proceeding, an award of monetary damages (as distinguished from a return of money already paid) is not permitted by the Act.

END OF EXCERPT FROM WILEMAN I

II. The Secretary Was Not Required to Promulgate Through APA Rulemaking the Board's Minimum Prices and Special Assessments for Reserve Almonds Disposed of for Almond Butter and School Lunches.

The ALJ held that the Secretary erred by failing to promulgate through APA rulemaking the Board's minimum prices and special assessments for reserve almonds disposed of under the Program for almond butter and school lunches, stating (Initial Decision at 49-53):

> Third, Petitioners argue that the Secretary should have invoked the APA and allowed notice and comment on the determination of the minimum prices and special assessments

on almonds disposed of under the Program. While Petitioners label their argument as whether the Board exceeded its authority by establishing the minimum prices and special assessments, the focus of their argument is that the Secretary should have followed the APA in establishing the minimum prices and special assessments.

Petitioners explain that the Board determined the minimum prices and special assessments for almonds sold into almond butter or other non-competitive outlets. These minimum prices and special assessments were made part of the agency agreement, signed by handler, to act as agent for the Board in disposing of his reserve almonds. These minimum prices and special assessments were not promulgated through rulemaking. (Tr. 329) Minimum prices were established for almonds sold into almond butter. An advertising assessment was also established that must have been paid in addition to the minimum price for almonds sold into almond butter. (PX 36, 41, 43, 58; RX 5, 6, 21, 34, 64, 65, 84, 85, 86) The advertising assessment applied to almonds sold for feed, as well. (Tr. 92)

Respondent asserts that rulemaking was not required for the special assessments and the minimum prices because a handler accepted the assessments and prices on a voluntary basis by signing the agency agreement. (Tr. 440-41) Respondent describes the agreement as voluntary because a handler always had the choice to turn his almonds over to the Board. If a handler signed an agency agreement, he disposed of the almonds and certified to the Board that the almonds were sold into an acceptable outlet. If a handler turned his almonds over to the Board, the Board would sell them into an acceptable outlet and give the proceeds, less any expenses to the handler. If more than one handler turned reserve almonds over to the Board, the Board would pay each handler his pro rata share of the proceeds. 7 C.F.R. § 981.66 (1989).

Respondent explains that the terms of the agency agreement were sent to the Secretary. If the Secretary had any changes, AMS would call or write with the changes; otherwise, the absence of a call or letter constituted approval of the agency agreement, as all actions of the Board are subject to the continuing right of the

Secretary to disapprove. 7 C.F.R. § 981.40(d) (1989). (Tr. 442, 467-69)

The minimum prices and special assessments were determinations that affected the handlers' disposition of their reserve almonds. They were substantive in nature and should have been promulgated as a rule pursuant to the APA.

Petitioner Saulsbury did not have the proper manufacturing equipment to make almond butter. It would have cost approximately $100,000 to buy the necessary equipment, and that figure does not include packaging equipment. (Tr. 86-87) When the Program was first established, Saulsbury attempted to find an outlet for almond butter but was unable to find anyone willing to purchase the almonds at the minimum price set by the Board. Later, Saulsbury sold some almonds for export and maybe a small amount domestically for use in almond butter. (Tr. 87-89) Since Saulsbury was unable to sell its reserve almonds for almond butter, they were sold for cattle feed, for two to four cents a pound. (Tr. 91-92) Almonds were selling on the world market at the time for a $1.00 to $1.10 a pound. (Tr. 92) Saulsbury was charged an advertising assessment on the almonds sold into cattle feed. (Tr. 92) Saulsbury estimated that throughout the Program it and its growers lost approximately $2.5 million, $600,000 to $700,000 of which would have been profit for Saulsbury. (Tr. 103-04)

Petitioner Cal-Almond, Inc., also attempted to find almond butter outlets when the Program was created. (Tr. 157) For the first three years of the Program, all of Cal-Almond's almonds went into feed lots, because it could not find any market for almond butter. (Tr. 163) In the last year of the Program, working with brokers, Cal-Almond discovered that Blue Diamond was selling their almonds for almond butter and started selling its almonds to the same buyer. However, the buyer would not buy Cal-Almond's almonds at the minimum price as set by the Board, so Cal-Almond reimbursed the buyer four or five cents a pound as a purported commission to sell the almonds. (Tr. 165-66)

The Secretary is required to promulgate substantive rules pursuant to the APA. 5 U.S.C. § 553 (1988). The handlers were entitled to an opportunity to participate in the rulemaking process.

These prices and assessments were imposed on the handlers and they were required to abide by them.

While Respondent argues that the minimum prices and special assessments were not rules because the acceptance of which by handlers was voluntary, Respondent admits, as a practical matter, that handlers almost never turned their almonds over to the Board, but retained control of them. The reason for this was that the Secretary could have subsequently released all or part of the reserve back into salable almonds, thus permitting the handler to sell the almonds for any use. Accordingly, the choice to enter into the agency agreement was not purely voluntary. The handler had two choices: (1) turn over all of his reserve almonds to the Board and lose control over the entire reserve, even the portion that the Secretary could later release as salable; or (2) sign the agency agreement and retain control over the reserve almonds. This was hardly a choice. Whether or not to enter into the agency agreement was not a voluntary decision as it was the only sound business decision the handler could make. (Tr. 160)

In their reply brief, Petitioners argue that the process by which the Secretary would call the Board, by way of AMS, if there were any questions or changes and the absence of a call constituted approval, does not equal approval. Petitioners cite to this Administrative Law Judge's decision in *In re Jet Farms, Inc.*, 88 AMA Docket No. 985-1, February 2, 1990, in which I held that the regulation requiring approval by the Secretary required something more than silence, that it required an affirmative response from the Secretary. While the facts here are somewhat similar to those present in *Jet Farms*, they differ in that here there was an established practice by which the Secretary communicated approval. The Secretary would, through AMS, call or write to make any changes or ask any questions. The absence of a call or a letter indicated to the Board that the agreement had been approved. In fact, the Secretary called on several occasions with changes. (Tr. 442-43, 467-69) This was understood by all to be the procedure for approval of the agreements. In *Jet Farms* there was no such practice established.

The fact that the Secretary approved of the minimum prices and special assessments established that the Board was not acting

beyond its delegated authority. However, the handlers were entitled to notice and the right to participate as guaranteed by the APA.

As a prelude to a discussion of my views with respect to this issue, it should be noted that the Order provides for restoring almonds (to the extent possible) to a handler who has turned his reserve almonds over to the Board if there is a later increase in the saleable percentage. The Order provides (7 C.F.R. § 981.59(b)):

> **§ 981.59 Adjustment upon increase of salable percentage.**
>
> . . . .
>
> (b) In the case of handlers who have not been authorized to dispose of their own reserves, and handlers who have terminated their agencies to dispose of their own reserves, prior to an increase in the salable percentage, insofar as practicable each such handler shall be permitted to select almonds from his own reserve to be restored to his salable quantity. In the event there are not sufficient reserve almonds held by the Board at the time the salable percentage is increased, to make full restoration, as represented by the increase in the salable percentage, to all such handlers, the restoration to the salable quantities of the respective handlers shall be pro rata on the basis of certified kernel weight poundage of reserve contributed by said handlers during the crop year to the date of increase of the salable percentage: *Provided*, That restoration shall be made in a manner that will result, to the extent practicable, in a comparable percentage of reserve disposition for each such handler and that no handler shall receive almonds in excess of his contribution. Such restoration to the salable quantity shall be deemed to fulfill the obligation of the Board with respect to the increase in the salable percentage.

Nonetheless, since almost all handlers sign agency agreements, and dispose of their own almonds as agents of the Board, undoubtedly there is an economic incentive for handlers to sign agency agreements. That economic incentive (or even coercion) does not mean, however, that the Secretary was required to publish

the Board's minimum prices and assessments through the rulemaking process. To consider this matter in the context of the specific agency agreements involved, the agency agreement entered into between the Board and handlers for the 1982-83 crop, which is typical of the others (RX 34, 65, 85), provides as follows (PX 38):

AGENCY AGREEMENT-DISPOSITION OF RESERVE TO NONCOMPETITIVE OUTLETS

THIS AGREEMENT, made this ____ day of _____, 19__, between the Almond Board of California, hereinafter referred to as "Board," and _____, a handler of almonds, hereinafter referred to as "Agent," WITNESSETH that:

WHEREAS, Section 981.66 of the Order of the Secretary of Agriculture regulating the handling of almonds grown in California, hereinafter referred to as the "Order," authorizes the Board to dispose of reserve almonds in noncompetitive outlets; and

WHEREAS, Section 981.67 of the Order permits handlers of almonds to become agents of the Board in such disposal; and

WHEREAS, Agent as a handler of almonds is subject to the provisions of the Order and has requested authority to act as agent of the Board in the disposition of reserve almonds; and

WHEREAS, timely information on Agent's intentions to dispose and dispositions of almonds into noncompetitive outlets is necessary for effective administration of the reserve and for marketing policy determinations of the Board;

NOW, THEREFORE IT IS AGREED BY AND BETWEEN the parties as follows:

1. *General.* (a) Subject to the provisions of Section 981.66 of the Order and the regulations applicable to the crop year, Agent is hereby authorized on behalf of the Board to dispose of reserve almonds held or acquired by Agent and which are subject to the Board's disposal authority. Such

disposition shall conform with such inspection, certification, and other disposition terms and conditions as the Board may herein prescribe or from time to time specify, and shall be subject to the limitations placed on the Board's disposal authority for the crop year.

. . . .

5. Agent, by signing this agreement certifies that:

(a) When almonds are to be used for almond butter,[17] he will comply with the minimum prices of almonds as established by the Board . . . .

The minimum price schedule (established by the Board and approved by the Secretary) for the 1982-83 reserve program, which is typical of the others (PX 43, 58; RX 65, 84),[18] was as follows (RX 21):

MINIMUM PRICE SCHEDULE
1982-83 Reserve Program

1. Minimum Prices

a. Almond Butter

Minimum prices for reserve almonds sold for diversion to almond butter. Prices are per pound, FOB handler's plant — 25 pound containers or larger:

U.S. Select Sheller Run (or better)

Unblanched	50 cents
Blanched	00 cents

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[17] The agency agreements for 1984-85 and 1985-86 also referred to school lunches (RX 65, 85).

[18] The 1984-85 and 1985-86 minimum prices were higher, and minimum prices were set for the school lunch program (RX 65, 84; PX 58).

U.S. Standard Sheller Run	
Unblanched	49 cents
Blanched	69 cents
U.S. Number 1 Whole and Broken and U.S. No. 1 Pieces	
Unblanched	48 cents
Blanched	68 cents

Note: An advertising assessment of 10 cents per pound must be added to the above prices. The 10 cents per pound additional cost is charged "to generate advertising and general promotional funds for the butter program". The 10 cents per pound is refundable to manufacturers who buy reserve almonds to make butter and who comply with the advertising and promotion provisions of the butter program. Such refunds in turn are creditable by the Board to the handler's almond butter advertising assessment obligation. (Reference Addendum 2 to Minimum Price Schedule.)

b. USDA School Lunch

Minimum prices for reserve almonds sold for diversion to USDA school lunch. Prices are per pound, FOB handler's plant:

Whole natural	70 cents
Roasted, unsalted	95 cents
Roast:	Oil or dry
Varieties:	Nonpareil, California, NePlus
Grade:	U.S. No. 1
Size:	30 or larger
Packaging:	25 lb carton for whole natural 25 lb. carton vacuum sealed packs for roasted

Turning now to the relevant provisions of the Order, the Order requires handlers to comply with reserve obligations. The Order states (7 C.F.R. § 981.46):

§ 981.46 Withholding reserve.

When a reserve percentage has been fixed for any crop year, as hereinafter provided, no handler shall handle almonds

except on condition that he comply with the requirements in respect to withholding reserve almonds and the prescribed disposition thereof.

A handler may meet his reserve obligation by signing an agency agreement with the Board, i.e., by becoming an agent of the Board, and disposing of his almonds in accordance with the Board's requirements, *or* by delivering his almonds to the Board. The Order provides (7 C.F.R. §§ 981.51, .52):

§ 981.51 Requirements for reserve.

Each handler may satisfy his reserve obligation with such almonds specified in the terms of the agency agreement authorized in § 981.67, including all applicable inspection and certification requirements. Any handler who does not become an agent may receive credit by similarly delivering almonds to the Board or its designees. These requirements may be established by the Board, with the approval of the Secretary, and from time to time so modified, and may include grade requirements for reserve almonds delivered to human consumption outlets.

§ 981.52 Holding requirement and delivery.

Each handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation less: (a) Any quantity which was disposed of by him pursuant to § 981.67 [i.e., by becoming an agent of the Board]; and (b) any quantity for which he is otherwise relieved by the Board of responsibility to so hold almonds. Upon demand of the Board reserve almonds shall be delivered to the Board f.o.b. handler's warehouse or point of storage, except that the Board shall not make such demand upon a handler with respect to reserve almonds for which he has agreed to undertake disposition pursuant to § 981.67. Any handler who does not act as agent for the Board in the disposition of reserve almonds shall be subject to the applicable inspection and certification requirements prescribed by the Board pursuant to § 981.67.

Of overriding importance is the fact that the Order gives the Board complete power and authority to dispose of *all* reserve almonds. The Order states (7 C.F.R. § 981.66(a)):

§ 981.66 Conditions governing disposition of reserve.

(a) *General.* The Board shall have power and authority to sell or dispose of any and all reserve almonds withheld upon the best terms and at the highest return obtainable consistent with the ultimate complete disposition of reserve, subject to all conditions of this section.

Section 981.66 of the Order contains a number of other subsections, one of which, subsection (c), specifies the uses to which reserve almonds can be put, including diversion into almond butter (7 C.F.R. § 981.66(c)), quoted in § I of the Judicial Officer's additional conclusions.

Section 981.66 also sets forth subsections relating to expenses and distribution of reserve proceeds, as follows (7 C.F.R. § 981.66(f), (g)):

(f) *Expenses.* Direct expenses incurred by the Board in the maintenance and disposition of reserve almonds shall be charged against the proceeds of sales of such almonds.

(g) *Distribution of proceeds.* Net proceeds from the disposition of reserve almonds by the Board shall be distributed to each handler in proportion to his relative share of such disposition in terms of creditable reserve kernel weight pursuant to § 981.51 or such other basis as the Board may adopt with the approval of the Secretary.

In lieu of turning over reserve almonds to the Board, so that the Board may dispose of them, a handler may become an agent of the Board, for the purpose of disposing of the reserve almonds, by signing an agency agreement. The Order provides (7 C.F.R. § 981.67) (emphasis added):

§ 981.67 Disposition by handler.

Upon request of a handler, made prior to the delivery by him of any reserve to the Board in any crop year, *the Board shall authorize such handler to act as agent of the Board, upon*

such reasonable terms and conditions, including inspection and certification requirements, *as the Board may specify* and subject to the conditions of § 981.66 in disposing of the reserve withheld from handling by such handler for that crop year. Any handler who is authorized to dispose of his reserve may, through arrangement with another handler dispose of such reserve through such other handler, or in lieu of disposition, may acquire credits for reserve disposition from another handler. In the first instance, the second handler shall also be subject to the conditions of § 981.66. It shall be the obligation of any handler authorized to dispose of such reserve to effect disposition thereof in accordance with all applicable requirements and conditions. The proceeds of such disposition shall be retained by the handler making the disposition, except that, in case he disposes of the reserve of another handler, the proceeds from that disposition shall be divided between the handlers on the basis of a mutual agreement. Such authorization shall expire as of September 1 of the next crop year, and any reserve then remaining undisposed of by the handler shall be returned to the Board. If the date of September 1 specified in § 981.66(e) is extended, the date of September 1 shall be extended correspondingly. Any handler who has been authorized to act as agent of the Board in disposing of his reserve may terminate such agency as of April 1 of the particular crop year by giving written notice to the Board to that effect not later than the previous March 20, in which event such handler shall return to the Board, for disposition by it, all reserve almonds remaining in his possession. In case a handler does not terminate his agency as of April 1, he shall be required to continue to serve as such agent until September 1 of the next crop year. The Board shall not terminate such an agency prior to September 1 unless the agent violates the terms and conditions specified by the Board or other provisions of the order. During the period of such agency the Board, as principal, shall not dispose of the reserve withheld from handling by said agent. The Board, *with the approval of the Secretary* may prescribe such rules and regulations as are necessary to regulate dispositions of reserve almonds including methods for crediting as reserve any salable almonds sold and delivered to reserve outlets.

Since the Order (promulgated on the basis of a formal rulemaking record, which is not challenged as to this issue) gives the *Board* the full power and authority to sell or dispose of all the reserve almonds, subject only to the conditions of the Order, and the Secretary's right to disapprove, it does not matter whether a handler is economically compelled to enter into an agency agreement. Whether or not there is an agency agreement, the Board has complete power as to all reserve almonds. The Board must comply with the express provisions of the Order, and it is subject to the power of the Secretary to veto any Board action. But the Board does not have to seek handler approval or concurrence with respect to anything relating to the disposition of reserve almonds. For the purposes of this proceeding, the hearing record supporting the Board's plenary authority as to reserve almonds is not challenged.

Whether it was wise to give the Board complete authority to dispose of the reserve almonds as it sees fit, subject only to the conditions set forth in the Order and the Secretary's veto authority, is not open to question in this administrative review proceeding. Wisely or unwisely, under the Order, handlers have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds and, therefore, it is enough that the Secretary approved the minimum prices and assessments determined by the Board for the Program for almond butter and school lunches, without seeking the advice and consent of handlers, or promulgating the Board's determinations through APA rulemaking.

Assuming that the Secretary was required to promulgate through APA rulemaking the minimum prices and special assessments for reserve almonds disposed of for almond butter and school lunches, the Act does not authorize the award of consequential, monetary damages (as distinguished from a return of monies paid) (see § I, Additional Conclusions by the Judicial Officer), and, therefore, nothing could be done for petitioners here, even if the Secretary erred in this respect (which is not the case).

III. The Secretary Was Not Required to Allow Notice and Comment on the Rule Extending the Date for Disposing of Reserve Almonds from September 1, 1986, to March 1, 1987.

The ALJ held that it was error for the Secretary to fail to allow notice and comment on the rule issued August 20, 1986, and published August 25, 1986 (PX 25; 51 Fed. Reg. 30,203, 30,204 (1986)), extending the date for disposing of reserve almonds from September 1, 1986, to March 1, 1987, stating (initial Decision at 5359):

> Petitioners argue that the Secretary's action on or about August 20, 1986, extending the date for disposing of reserve almonds from September 1, 1986 to March 1, 1987, violated the APA. Petitioners contend that the Secretary should have issued a proposed rule and allowed notice and comment. Instead, the Secretary merely issued a final rule. (PX 25)

Relying on the AMS field agent's report, Petitioners assert that the recommendation by the Board to extend the date for disposition of the reserve almonds was unfair. The report provides in relevant part:

> Chairman Walt Payne reported the recommendations and discussion of the Market Development Committee. Based upon the recommendation of the committee, the ABC recommended that the Secretary extend the effective date for disposition of reserve almonds from September 1, 1986, to March 1, 1987. This action is authorized under section 981.66(e) and would permit the industry to dispose of about 6.6 million pounds of unsold reserve almonds over a longer period of time and so help prevent the sales from unduly depressing prices in the market. It also enables the industry to supplement the reduced 1986-87 crop supply by carrying over 6.6 million pounds from the large 1985-86 crop. The ABC motion was made on a nine to one vote, with Cloyd Angle voting in opposition. Mr. Angle, and certain others at the meeting indicated that they believed CAGE had taken advantage of its dominance in the industry and on the ABC in this action. They contended that when the low crop estimate for the 1986 crop was announced in April that CAGE stopped

> selling reserve almonds, confident that prices would increase and that CAGE could ensure a recommendation to the Secretary to extend the deadline for the sale of those almonds. CAGE, of course, controls 6 of the 10 ABC positions, enough for a voting majority. There is probably some validity to both CAGE's and Cloyd Angles's [sic] explanations for the recommendation, since CAGE almost certainly realized that an extension was both obtainable and desirable to it as a business, but also it seems clear that an extension would benefit the industry as a whole by stabilizing almond supplies over the 1986-87 season.

(RX 87) Petitioners argue that the fault with this report is that there is no analysis demonstrating that an extension would stabilize almond supplies over the 1986-87 season. The 1986 crop was extremely short and there was a larger demand than supply. But extending the date for disposition of almonds sold into non-competitive outlets would not help stabilize almond supplies as reserve almonds were not intended to compete with salable almonds.

Petitioners contend that Blue Diamond "railroaded" the recommendation through because it would benefit their business. At the time of the proposal, Blue Diamond had 4.7 million pounds of the 6.6 million pounds of reserve almonds. Blue Diamond handled over sixty percent of the crop in 1985-86, and had over seventy-one percent of the remaining reserve obligation. (PX 134; Tr. 323-33) Section 981.67 of the Order provides that if a handler has not disposed of the reserve by September 1, the handler must turn over to the Board the undisposed of reserve, unless the date is extended pursuant to section 981.66(e), then this date is correspondingly extended. 7 C.F.R. §§ 981.66(e), .67 (1989).

The Board conducted an audit of companies that certified to the Board that they were purchasing almonds for use in almond butter. The audit disclosed that one of the companies that Blue Diamond was selling to was not making almond butter. (PX 64; Tr. 348-552)

According to Petitioners, the audit combined with Blue Diamond's holding back their reserve almonds, added to the growing dissatisfaction of some of the handlers with the Program.

(PX 62, 63; RX 75, 87, 88) As a result, the Secretary should have allowed notice and comment, even if it was for a shorter period than normally allowed.

Respondent argues that the Secretary properly invoked the good cause exception to providing for notice and comment in which the APA provides that notice and comment rulemaking is not required: "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1988). Respondent contends that notice was both impracticable and unnecessary. The extension had to be effective September 1 as that was the date by which the reserve must have been sold. The recommendation was voted on at the July 30, 1986 meeting. The Secretary then considered the information that had been submitted by the Board and issued a decision within approximately three weeks. The rule appeared in the *Federal Register* on Monday, August 25, 1986. (PX 25)

Respondent asserts that prior notice was unnecessary since the possibility of an extension was discussed in committee meetings and a Board meeting, at which any interested person could have made known his views and those views would have been transmitted to the Secretary for consideration. (PX 39, 62; RX 88)

The Secretary in the final rule stated that an emergency situation existed and as a result there was not enough time for notice and comment (PX 25):

> It has been determined that an emergency situation exists which warrants publication of this final rule without prior opportunity for public comment. This action will relax a restriction on handlers by allowing them additional time to sell their 1985-86 crop year reserve almonds beyond the current September 1, 1986, deadline. Therefore, this action should take effect on or before September 1, 1986, and consequently, there is not sufficient time to issue a notice of proposed rulemaking soliciting comments from the public.
>
> Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that

> notice of rulemaking and other public procedure with respect to this emergency action are impracticable and contrary to the public interest, and that good cause is found for making this emergency final action effective less than 30 days after publication of this document in the Federal Register.

The good cause exception to notice and comment is an emergency procedure, which must be interpreted narrowly, and used only when the delay attendant to notice and comment rulemaking would do real harm. *Buschmann*, 676 F.2d at 357; *United States Steel Corp. v. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979). "As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim." *American Fed'n of Gov't Employees* v. *Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Examples of where the good cause exception has been found to have been properly applied were explained in *South Carolina* v. *Block*, 558 F. Supp. 1004, 1018 n. 18 (D.S.C. 1983):

> Courts have found good cause several times in cases involving government price controls, because the announcement of future controls could cause severe undesirable market distortions. *See De Rieux* v. *Five Smiths, Inc.*, 499 F.2d 1321 (Em. App.), *cert. denied*, 419 U.S. 896 (1974); *Nader* v. *Sawhill*, 514 F.2d 1064 (Em. App. 1975). The exception has been approved concerning regulations on gas stations where shortages and discriminatory prices had led to deprivations of supply and violence. *Reeves* v. *Simon*, 507 F.2d 455 (Em. App. 1974), *cert. denied*, 420 U.S. 991 (1975). It has also been permitted when the exigencies of a foreign relations crisis made an imperative response essential. *Narenji* v. *Civiletti*, 481 F. Supp. 1132 (D.D.C. 1979); *cf. Yassini* v. *Crosland*, 618 F.2d 1356 (9th Cir. 1980).

The examples illustrate that the good cause exception requires a true emergency with exigent circumstances. Courts have warned that such emergency situations are rare and that courts will closely scrutinize the reasons used for dispensing with notice and comment. *American Fed'n of Govt Employees*, 655 F.2d at 1157 n. 6; *Mobil Oil Corp.* v. *Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

There was no emergency in this case. It is true that there was a short period of time from the Board meeting, on July 30, until September 1, the date by which reserve almonds must have been sold. Yet, there was ample time with which to allow a notice and comment period. The Secretary could have shortened the comment period and still met the September 1 deadline.

The Secretary had to have known from the Order that such a situation could present itself, when the deadline set in the Order for disposal of reserve almonds was September 1. Courts have rejected an agency's reliance on the good cause exception where the so-called emergency was solely the result of the agency's own creation of deadlines, or merely a reflection of a desire for administrative efficiency. *Levesque* v. *Block*, 723 F.2d 175, 184 (1st Cir. 1983); *Sharon Steel Corp.* v. *E.P.A.*, 597 F.2d 377, 380 (3rd Cir. 1979); *South Carolina*, 558 F. Supp. at 1018.

The Secretary stated in the final rule that there was not sufficient time to allow notice and comment. The Secretary provides no other reason for failing to provide notice and comment. Since deadlines alone cannot equal good cause, the Secretary failed to provide a good cause for dispensing with notice and comment. Mere recitation that there was good cause does not create good cause, [nor] does a desire to provide immediate guidance. *Mobil Oil Corp. v. Dep't of Energy,* 610 F.2d at 803.

Notice and comment should have been allowed especially since there was an intense disagreement among the handlers over whether the date for disposition should have been extended. Blue Diamond had seventy-one percent of the almonds still in reserve and stood to benefit greatly if the almonds were released. The independent handlers should have been granted the right to comment as this was a significant decision affecting the almond industry. Prior comment at the Board meeting cannot substitute for the requirement of notice and comment contained in the APA. Not all who wanted to comment might have been present at the Board meeting. In addition, notice and comment allows anyone, not merely handlers in the industry, to comment. This would give someone a chance to comment who might not have known about the Board meeting. If this kind of prior comment could substitute for the notice and comment required, Congress would have so specified.

Additionally, Petitioners argue that the Secretary's decision to extend the reserve was arbitrary and capricious. However, there is no need to consider that issue as I find that the Secretary violated the APA in promulgating the rule, and as such the regulation is invalid. *Buschmann*, 676 F.2d at 355-56.

As mentioned above, an audit was conducted of companies buying almonds to manufacture almond butter, and one company admitted that it was not manufacturing almond butter. As a result, Petitioners argue that it is a violation of the AMAA and the Order that individual handlers were allowed to keep the proceeds from the sale of exempt reserve almonds to almond butter, almond oil, and/or cattle feed, rather than having the Board divide the proceeds pro rata among all of the handlers. Petitioners complain that a number of handlers, including Blue Diamond were able to find outlets for almond butter while the Petitioners were not. Petitioners charge that one reason that Blue Diamond found an outlet was because the company, disclosed by the audit, was buying almonds not for use in almond butter but for resale. Petitioners argue that all handlers should have had the same chance to sell almonds into the same outlets, but because they did not, they should now get to share in the profits earned by those who did find outlets for almond butter. Thus, the Board should collect the profits and distribute them pro rata among all of the handlers.

Petitioners appear to be requesting a remedy. There is no provision in either the AMAA or the Order which allows for such a remedy. Further, Petitioners fail to explain how there was a violation of the AMAA. The Order, as authorized by the AMAA, provides that if a handler turns his almonds over to the Board, the Board will dispose of the almonds and then distribute to the handler his pro rata share of the profits, less any expenses. 7 U.S.C. §§ 608c(6)(C)-(E) (1988); 7 C.F.R. § 981.66 (1989). But Petitioners did not turn their almonds over to the Board. Instead they signed an agency agreement and chose to retain control over the disposition of their reserve almonds. 7 C.F.R. § 981.67 (1989). (Tr. 87-88, 160)

It is true that the audit revealed that abuses occurred in the administration of the Program. This demonstrates a need in the

future for a closer monitoring of the Program, or similar undertakings by the Board.

In the first place, since the Secretary's challenged action *relaxed* a regulatory requirement otherwise in effect, there is no basis for petitioners to challenge that action in a § 8c(15)(A) proceeding. Under the plain terms of the Act, a handler's petition under § 8c(15)(A) of the Act is limited to "stating that any such order or *any provision of any such order or any obligation imposed in connection therewith* is not in accordance with law *and praying for a modification thereof or to be exempted therefrom,"* and the Secretary is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A) (emphasis added)).

The provisions of the Order authorize the Secretary to extend the September 1 deadline, as follows (7 C.F.R. § 981.66(e)):

> (e) *Disposition after September 1*. Any reserve almonds remaining unsold as of September 1 shall be disposed of by the Board as soon as practicable through the most readily available reserve outlets. The date of September 1 herein specified may be extended to a later date by the Secretary, upon recommendation of the Board or other information.

Those provisions of the Order are not challenged by petitioners, so petitioners are not challenging the "order or any provision of any such order" (7 U.S.C. § 608c(15)(A)), in this respect. Furthermore, petitioners are not challenging any "obligation imposed [upon them] in connection therewith" (7 U.S.C. § 608c(15)(A)). Rather, petitioners are complaining that other handlers benefitted from this relaxation of the obligations, and that they did not. Since petitioners are not complaining in this instance of the Order, or any provision of the Order, or any obligation imposed upon them under the Order, they have no standing to seek redress in this § 8c(15)(A) proceeding. Even if they did have standing, since consequential damages cannot be awarded (as distinguished from a return of monies paid), no relief could be provided to petitioners in this proceeding (see § I, Additional Conclusions by the Judicial Officer).

In addition, the ALJ's conclusion fails to take notice of the undisputed realities of government rulemaking. The Board

recommended the extension on July 30, 1986, based on then current information and a Board meeting held that day. As the ALJ notes elsewhere in his decision, the Secretary does not simply rubber-stamp such recommendations. The specialists in the Fruit and Vegetable Division of the Agricultural Marketing Service must review all of the material (minutes, reports, and the like) submitted with the recommendation. They must prepare an analysis and recommendation which goes through several layers of review both within AMS and other agencies of the Department (*e.g.*, the General Counsel's office). This process, all of which precedes publication, often takes substantially more than a month. In this case, the rule had to be issued by September 1, 1986, one month after the Board's recommendation, thus preventing publication for comment.

The ALJ's citation of *Levesque* v. *Block*, 723 F.2d 175 (1st Cir. 1983), concerning "the agency's own creation of deadlines" (Decision, p. 57), is inapposite. The September 1 deadline was pre-existing and a permanent part of the Order. 7 C.F.R. § 981.66(e). That part of the Order containing the September 1 deadline was promulgated upon the basis of evidence adduced at a formal rulemaking hearing, the adequacy of which is not challenged by petitioners. In any event, it is obvious that when you are dealing with a new crop each season, there should be some deadline for disposing of the prior year's crop, so that the two seasons do not overlap more than is desirable in order to have supplies for sale before the new crop receipts are on hand at the beginning of the marketing year (July 1). The September 1 deadline is not an artificial deadline created by the agency for administrative efficiency, but, rather, is a reasonable deadline established on the basis of an unchallenged formal rulemaking record, demonstrating the need for disposing of each year's crop within a reasonable period.

Even if we were to assume (with no basis in the present record) that the September 1 deadline is unwise, it is, nonetheless, there in the Order, and it is binding unless extended by the Secretary. Accordingly, since the Secretary determined that it was desirable to extend the deadline from September 1, 1986, until March 1 of the next year, the Secretary's action had to be taken by

September 1, 1986, to prevent action from being taken pursuant to the September 1 deadline.

The ALJ did not consider whether extending the time for disposing of the reserve was arbitrary and capricious, but there is no merit to petitioners' contentions, in this respect. Although it is true that the reserve would not normally be sold in competition with saleable almonds not subject to the reserve, the informal rulemaking record and the Secretary's final rule show that there was a projected short 1986-87 almond crop, and that extending the deadline for disposing of the 1985-86 reserve until March 1, 1987, enabled the Board to have almonds available for the Program for almond butter and school lunches, without the need for a reserve to be established from the short 1986-87 crop.[19] Hence there was a rational basis in the informal record for the Secretary's action (PX 62, 63; RX 75, 87, 88).

IV. Section 981.441 of the Order Does Not Violate § 8c(10) of the Act, Which States That No Order Shall Prohibit, Regulate, or Restrict the Advertising of Any Commodity or Product Covered by the Order.

The ALJ held that § 981.441 of the Order violates § 8c(10) of the Act (7 U.S.C. § 608c(10)), because it regulates and restricts the

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[19] There is statutory authority for the establishment of a reserve for a marketing development program, even in a season where the supply-demand situation would not permit a reserve for supply- management purposes. 7 U.S.C. §§ 602(3), 608c(6)(E), (I). The Order also authorizes such a reserve. Specifically, the Order provides that reserves are authorized when they "would tend to effectuate the declared policy of the Act" (7 C.F.R. § 981.47). The declared policy is, inter alia, to establish orderly marketing conditions to foster adequate returns for growers (7 U.S.C. § 602). The Secretary can certainly find that the creation of additional outlets for a commodity will increase returns to growers. Furthermore, contrary to petitioners' assertions that the language of §§ 47, 48 and 49 of the Order (7 C.F.R. §§ 981.47, .48, .49) are mandatory, those sections give the Secretary wide discretion. For example, "the Secretary shall give consideration to . . ." (7 C.F.R. § 981.47); "the Secretary *may* increase the salable percentage" (7 C.F.R. § 981.48) (emphasis added); and "the Secretary . . . may act . . ." (7 C.F.R. § 981.49).

advertising of almonds by handlers. The ALJ states (Initial Decision at 65-66):

> Second, Petitioners argue that sections 981.41 and 981.441 of the Order violate section 8c(10) of the AMAA. 7 U.S.C. § 608c(10) (1988). Section 8c(10) provides (emphasis added):
>
> > (10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. *No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.*

Petitioners argue that sections 981.41 and 981.441 compel handlers to spend their own money to advertise, while prohibiting many forms of advertising in which a handler can engage. This is a prohibition on the advertising of a commodity and section 8c(10) makes no exceptions.

Respondent argues that Petitioners conceded that there is no restriction on what they may advertise. (Tr. 435) In fact, Petitioners admit that they have published advertisements for which they did not receive credit. Yet, they argue that their advertising is regulated because of the provisions which explain what kind of advertisement will be considered as credit toward the advertising assessment. Section 981.41 does not compel handlers to advertise, they may pay their assessment directly to the Board.

Section 981.441 of the Order violates section 8c(10) of the AMAA because it regulates and restricts advertising. Section 8c(10) is absolute in its applicability that no Order shall prohibit, regulate or restrict the advertising of a commodity. *Black's Law Dictionary* defines "regulate" as follows: "To fix, establish, or control; to adjust by rule, method, or established mode; to direct

by rule or restriction; to subject to governing principles or laws." *Black's Law Dictionary* 1156 (5th ed. 1979). Section 981.441 in its simplest form is a regulation, regardless of whether it compels handlers to advertise. While section 981.441 does not prohibit advertising, it certainly regulates and restricts advertising that handlers must utilize in order to receive credit toward their assessments.

Respondent's argument that Petitioners conceded that there is no restriction on what they may advertise, is a mischaracterization of the statement made by Petitioners' counsel. The statement was that Petitioners would "stipulate that the Board does not get involved at all in advertising unless it has to do with creditable advertising assessments." (Tr. 435) What is at issue is the Board's involvement with advertising due to the advertising assessments.

In reality, handlers do not have a choice. They must either pay the money directly to the Board or advertise in the manner required by section 981.441. Their only sound business decision is to advertise, hoping that it will lead to increased sales. Simply paying the money directly to the Board provides no opportunity to increase revenues.

I disagree with the ALJ's views. The ALJ quotes Black's Law Dictionary on the meaning of the word regulate. Although his definition is correct, he applies it to the wrong regulation. The Order is regulating a handler's *ability to receive credit*; it is not regulating his advertising. This is self-evident from the terms of § 41 of the Order and § 441 of the regulations (7 C.F.R. §§ 981.41, .441). Furthermore, petitioners themselves concede that there is no regulation or restriction whatsoever on what they may advertise (Tr. 435). They have published many advertisements that would be in violation of § 981.441, if that section, as the ALJ erroneously held, actually regulated advertising. (Tr. 78-82, 178). Thus, by their own actions, petitioners have established that the Order does not regulate advertising, and did not prevent petitioners from publishing advertisements which did not qualify for credit.

Assuming that the ALJ were correct, i.e., that the provisions of § 981.441 were a regulation of advertising (which is not the case), this would not violate 7 U.S.C. § 608c(10) because § 981.441 applies only when a handler so chooses. The ALJ

correctly notes that: "Section 981.41 does not compel handlers to advertise, they may pay their assessment directly to the Board" (Initial Decision at 6566). The ALJ, however, goes on to say that "handlers do not have a choice" (Initial Decision at 66). He bases this finding on his determination that it is their only sound business decision because: "Simply paying the money directly to the Board provides no opportunity to increase revenues." (Initial Decision at 66).

First, as noted in § II of the Judicial Officer's additional conclusions, the fact that one of several choices is economically beneficial does not render the other choices nugatory, nor does it mean that there is no choice.

Moreover, the ALJ has substituted his judgment not only for that of the Secretary, but, also, of Congress as well. Congress amended the Act specifically to permit marketing order provisions which would permit boards (such as the Almond Board) to undertake marketing promotion (including advertising programs) with money paid directly to the Board. Because the purpose of the Act is to benefit the commodity industries (farmers and handlers) regulated by the Act, Congress necessarily concluded that paying money directly to the Board *will* provide an opportunity to increase revenues. Furthermore, the Secretary necessarily reached the same conclusion in issuing §§ 981.41 and 981.81, which were issued upon the basis of a formal rulemaking record which is not challenged by petitioners, in this respect. Therefore, to the extent the ALJ based his conclusion on his view that paying money to the Board will not increase revenues, it is erroneous. Furthermore, as stated in the material added in brackets to Finding 64, Dr. John Baritelle, Agricultural Economist, University of California at Riverside, conducted a study showing that the returns to the almond industry from almond advertising under the Order substantially exceed the expenditures.

In addition, assuming *arguendo* that § 981.441 does regulate advertising and that the fact that handlers may choose whether to be subject to § 981.441 is of no consequence, § 981.441 still does not violate 7 U.S.C. § 608c(10).

In construing the relevant statutory provisions (7 U.S.C. §§ 698c(6)(I), (10)), it is significant that § 8c(10), which provides

that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby," was included in the Act in 1935 (Pub. L. No. 320, 49 Stat. 750, 758 (7 U.S.C. § 608c(10) (1935)), when there was no provision in the Act relating to projects for marketing promotion including paid advertising. Congress added the authority for projects for marketing promotion including paid advertising (originally applicable only to cherries) in 1962 (Pub. L. No. 87-703, 76 Stat. 605, 632 (7 U.S.C. § 608c(6)(I) (1962))), 27 years after the Act was enacted. Congress added the authority for crediting advertising expenditures against assessments in 1970, when it also added almonds, as a commodity which could be the subject of projects for marketing promotion including paid advertising (Pub. L. No. 91-522, 84 Stat. 1357 (7 U.S.C. § 608c(6)(I) (1970))). Section 8c(10) (7 U.S.C. § 608c(10)), enacted in 1935, therefore, did not contemplate any advertising pursuant to a marketing order. More specifically, when Congress prohibited the regulation of advertising in 1935, Congress did not contemplate limiting the Secretary's right to regulate expenditures for advertising that are credited towards handler's assessment obligations.

Section 8c(6)(I), as amended, states that orders may provide for crediting a handler's assessment obligations "with all or any portion of his direct expenditures for *such* marketing promotion including *paid advertising as may be authorized by the order*" (7 U.S.C. § 608c(6)(I) (emphasis added)). Because, as the ALJ notes, the word "regulate" is so broad, the limitations in § 8c(6)(I) (emphasized in the preceding sentence) would be rendered meaningless, if the Secretary could in no way regulate the manner of giving a handler credit for paid advertising. The Secretary would, arguably, not even be able to verify that the money was spent or that the advertisement was primarily to sell almonds, as these reasonable conditions of establishing eligibility for credit are now done by regulation. This is a result Congress cannot have intended. The Act is intended to benefit producers, handlers, and consumers of the various regulated commodities and to help farmers obtain a fair value for their agricultural products. (*See* 7 U.S.C. §§ 601, 602; *United States v. Rock Royal Co-Op, Inc.*, 307 U.S. 533 (1939); *Zuber v. Allen*, 396 U.S. 168 (1969); *Pescosolido*

v. Block, 765 F.2d 827 (9th Cir. 1985)). Advertising, as authorized by the Act, can serve this function only if it relates to the commodity being regulated. Almond farmers cannot benefit by advertisements promoting, for example, grocery stores or competing nuts. (These are two of the restrictions which § 981.441 puts on a handler's ability to receive credit for advertising). If, however, the ALJ were correct in his application of 7 U.S.C. § 608c(10), an almond handler could advertise grocery stores or competing nuts or political issues and, by including a reference to almonds, receive credit under the almond program for such expenditures. This is because the ALJ has found that the Secretary cannot in any way regulate the advertising a handler does and submits to the Board for credit. This is contrary not only to the clearly expressed intent of Congress, but to the express words of the Act that credit should be for "such marketing promotion including paid advertising as may be authorized by the order" (7 U.S.C. § 608c(6)(I)). Hence the Act must be construed to authorize reasonable provisions ensuring that advertising, to be eligible for credit towards a handler's obligations, actually promotes the sale of almonds.

Several principles of statutory interpretation support this interpretation of the Act. First, where two provisions of an amended statute seem to be in conflict, "the provisions of the amendment must prevail over those of the original statute on the theory that the former [the amendment] constitutes the last expression of the will of the legislature" (Crawford, *The Construction of Statutes* 617-18 (1940)). In this case, § 8c(6)(I) is more recent than §§ 8c(10) (7 U.S.C. §§ 608c(6)(I), (10)).

Second, when there is a conflict, the more specific section controls the general. Crawford, *The Construction of Statutes* 265 (1940), and *2A Sutherland Stat. Const.* § 46.05, at 92 (4th ed. 1984). See, also, *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). Here, 7 U.S.C. § 608c(6)(I) deals with a very specific advertising program, and crediting assessments for expenditures under the program, while 7 U.S.C. § 608c(10) is a general provision.

Third, one is to look to the congressional intent to resolve any ambiguity. As demonstrated previously, Congress intended the advertising program, including the availability of credit, to benefit almond farmers, which would not occur if handlers could advertise other items and receive credit. In this context, it is instructive to note the following comment from a treatise on statutory construction: "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *2A Sutherland Stat. Const.* § 45.12, at 54 (4th ed. 1984). See, also, *United States* v. *Brown*, 333 U.S. 18, 26-27 (1948); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943); *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940).

Fourth, the contemporaneous and settled administrative construction, which construes the Act as authorizing the type of provisions challenged here, is entitled to considerable weight.[20]

Finally, petitioners seem to be challenging the wisdom of the creditable assessment program, and the ALJ appears to be basing his decision, at least in part, on a similar theory. Petitions under

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[20] *Allen M. Campbell Co. Gen. Contractors, Inc.* v. *Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971); *Lawson Milk Co.* v. *Freeman*, 358 F.2d 647, 650 (6th Cir. 1966). See, also, *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n. 6 (1940); *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 335 (1933); *United Truck Lines, Inc.* v. *ICC*, 189 F.2d 816, 817 (9th Cir.), *cert. denied*, 342 U.S. 830 (1951); *L. Gillarde Co. v. Joseph Martinelli & Co.*, 169 F.2d 60, 60-61 (1st Cir.), *cert. denied*, 335 U.S. 885 (1948); *Armstrong Co.* v. *Walling*, 161 F.2d 515, 517 (1st Cir. 1947); *Superior Packing Co.* v. *Porter*, 156 F.2d 193, 195 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Bowles* v. *Mannie & Co.*, 155 F.2d 129, 133 (7th Cir.), *cert. denied*, 329 U.S. 736 (1946); *Bowles* v. *Cudahy Packing Co.*, 154 F.2d 891, 892 (3d Cir. 1946); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1055, *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

7 U.S.C. § 608c(15)(A) are not the forum for such challenges. *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85C1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987).

V. The Secretary Was Not Required by the APA to Allow Notice and Comment on the Annual Rules From 1980-86 Establishing the Assessment Rate, Including the Creditable Portion Thereof.

The ALJ held that the Secretary should have allowed notice and comment pursuant to the APA on the annual rules from 1980-86 establishing the assessment rate, including the creditable portion thereof, stating (Initial Decision at 72-74):

Petitioners also argue that the annual rules, from 1980-86, did not comply with the notice and comment provisions of the APA. Petitioners contend that there was ample time to issue a proposed rule and a final rule as was done for the years 1987-89.

Respondent counters that the Secretary did not allow notice and comment because it was a waste of money and impracticable given the time and resources available, especially since the assessment rate is determined by an arithmetic formula. Respondent also argues that the budget approval process for the Board is similar to the budget approval process, for example, of the Office of the General Counsel ("OGC") and the Office of Administrative Law Judges ("OALJ") of the Department and the Secretary is not required to employ notice and comment for the OGC or the OALJ. Respondent also contends that all interested parties were aware of the Board's recommendations.

The handlers were entitled to notice and comment in connection with the annual rules from 1980-86. As discussed previously, the exception to notice and comment contained in section 553 of the APA applies only to true emergency situations. 5 U.S.C. § 553 (1988). That the Department might want to save money is not an emergency situation. The rights of individuals are not to be forfeited in order to save a little money.

Respondent analogizes the budget process required by the Order to the Department's budgets for its agencies such as the Office of Administrative Law Judges, Office of the General

Counsel and Agricultural Marketing Service. Such internal agency budgets are rules of "agency organization, procedure or practice" which are excepted from the rulemaking requirement by 7 U.S.C. § 553(b)(B). However, as explained by the court in *Batterton* v. *Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980) [footnotes omitted]:

> The exemption cannot apply, however, where the agency action trenches on substantial private rights and interests. As the case law demonstrates, substantial rights and interests in this light have come into play when railroads are directed to file proposed schedules of rates and tariffs with subscribers; when applicants for food stamps are subject to modified approval procedures; when drug producers are subject to new specifications for the kinds of clinical investigations deemed necessary to establish the effectiveness of drug products prior to FDA approval; and when motor carriers are subject to a new method for paying shippers.
>
> Here, recipients of CETA emergency job program monies are subject to a new method for determining the one undefined variable in the statutory fund allocation formula. Although the methodology itself may look procedural, as Judge McGowan noted in a similar context. "[t]he characterizations 'substantive' and 'procedural' no more here than elsewhere in the law — do not guide inexorably to the right result, nor do they really advance the inquiry very far." The critical question is whether the agency action jeopardizes the rights and interests of parties, for if it does, it must be subject to public comment prior to taking effect. As that is the case here, the exemption cannot apply.

The budget process required by the Order is not analogous to the Department's internal budget process. Significantly, the internal budgets of the Department do not involve assessments. The assessments required to be paid by handlers [have] a substantial impact upon their private rights and interests and, therefore, the handlers should have been afforded an opportunity to participate in the rulemaking process by notice and comment.

Respondent's argument that it was impracticable given the amount of time, for the Secretary to issue a proposed rule also lacks merit. The Secretary issued proposed and final rules from

1987-89. This demonstrates that there was ample time to issue proposed and final rules for the creditable assessment rate. Additionally, the Secretary could have promulgated an interim rule, pending obtaining notice and comment for a final rule.

Respondent contends that handlers had an opportunity to participate in the Board's discussion of its recommendation to the Secretary by appearing at Board meetings. However, such participation is not a substitute for the procedural guarantees of the APA. Respondent's argument also assumes that the Secretary will automatically approve the Board's recommendation. However, the Secretary has the discretion not to follow the Board's recommendation.

While Respondent contends that notice and comment are unnecessary since the assessment rate is determined by an arithmetic formula, the APA requires otherwise. Whenever an agency imposes a rate upon individuals, the APA must be followed. 5 U.S.C. § 551(4) (1988). That a formula is used to determine the assessment rate is not good cause for disposing with notice and comment, as explained earlier. All aspects of the budget are discretionary. The Board prepares the budget and submits it to the Secretary for approval. The Secretary need not accept the budget. Petitioners, as well as the other handlers, are entitled to submit comments to the Secretary regarding the budget and assessment rate as it affects their rights. Board meetings cannot substitute for the public participation required by the APA. The rights and interests of the handlers cannot be disregarded simply because there is a formula for determination of the assessment rate.

The Secretary's final rule for the 1980-81 crop year, which is typical of the final rules for the 1981-82 through the 1986-87 crop years (RX 96, 103, 106, 110, 115, 119), states as follows (RX 94; 45 Fed. Reg. 56,793 (1980)):

> Pursuant to Marketing Order No. 981, as amended (7 CFR Part 981), regulating the handling of almonds grown in California, effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and upon the basis of the recommendations and information submitted by the Board, established under this marketing order, and upon other information, it is found that the

expenses and rate of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking and postpone the effective time until 30 days after publication in the Federal Register (5 U.S.C. 553), as the order requires that the rate of assessment for a particular crop year shall apply to all assessable almonds handled from the beginning of such year which began July 1, 1980. To enable the Board to meet crop year obligations, approval of the expenses and assessment rate is necessary without delay. Handlers and other interested persons were given an opportunity to submit information and views on the expenses and assessment rate at an open meeting of the Board. To effectuate the declared purposes of the act it is necessary to make these provisions effective as specified.

. . . .

§ 981.330 Expenses and rate of assessment.

(a) Expenses that are reasonable and likely to be incurred by the Board during the 1980-81 crop year, will amount to $8,798,833.

(b) The rate of assessment for said year payable by each handler in accordance with § 981.81 is fixed at 2.8 cents per pound of almonds (kernelweight basis), less any amount credited pursuant to § 981.41 but not to exceed 2.5 cents per pound of almonds (kernelweight basis).

In *In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705, slip op. at 77-86 (July 9, 1990), *appeal docketed,* No. CV F 90-473-EDP (E.D. Cal. July 27, 1990), I ruled on the same issue under the Nectarine and Plum Marketing Orders that is involved here. Specifically, I held that since the final rule announcing the assessment rate sets forth a statutorily-required ministerial calculation, good cause exists for dispensing with notice-and-comment rulemaking. My views there, which are equally applicable here, are set forth in their entirety, without the usual indentation used for quoted material, as follows:

EXCERPT FROM WILEMAN I

No issue is raised as to the statutory authority of the Secretary to collect assessments, including assessments to pay for advertising, but these statutory provisions are, nonetheless, vital to the APA issue raised by petitioners. The Act provides (7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii)-(iii) (emphasis added)):

> **(6) Other commodities; terms and conditions of orders**
>
> In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including fruits] orders issued pursuant to this section *shall contain one or more of the following terms and conditions, and* (except as provided in subsection (7) of this section), no others:
>
> . . . .
>
> (i) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided, That with respect to orders applicable to . . . plums [or] nectarines, . . . such projects may provide for any form of marketing promotion including paid advertising* and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . .
>
> . . . .
>
> (ii) *Each order* relating to any other commodity [i.e., other than milk] or product issued by the Secretary under this chapter *shall provide that each handler* subject thereto *shall pay to any authority or agency established under such order*

such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order . . . . The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) *Any authority or agency established under an order may maintain* in its own name, or in the name of its members, *a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses*. The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

Similarly, no issue is raised as to the validity of the Marketing Order provisions requiring each handler to pay his *pro rata* share of all expenses found by the Secretary to be reasonable, including expenses for advertising, but these provisions of the regulations are, nonetheless, vital to the APA issue raised by petitioners. The Nectarine Order provides (7 C.F.R. §§ 916.3 [1](c), .40, .41, .45 (emphasis added)):

§ 916.3[l] Duties.

The committee shall have, among others, *the following duties:*

. . . .

(c) To submit to the Secretary as soon as practicable *after the beginning of each fiscal period* a budget for such fiscal period, including a report in explanation of the items

appearing therein and a recommendation as to the rate of assessment for such period;

. . . .

§ 916.40 Expenses.

The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the committee for its maintenance and functioning and to enable it to exercise its powers *and perform its duties in accordance with the provisions of this part.* The funds to cover such expense shall be acquired in the manner prescribed in § 916.41.

§ 916.41 Assessments.

(a) *As his pro rata share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period shall pay to the committee, upon demand, assessments on all nectarines so handled.* The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) *The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses. At* any time during or after the fiscal period, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any later finding by the Secretary relative to the expenses which may be incurred. Such increase shall be applied to all nectarines handled during the applicable fiscal period. In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments on the current year's shipments,

the committee may accept the payment of assessments in advance, and may also borrow money for such purposes.

. . . .

§ 916.45 Marketing research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. *Such projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916-41.*

The Plum Order provides (7 C.F.R. §§ 917.35(f), .36, .37, .39 (emphasis added)):

§ 917.35 Powers and duties of each commodity committee.

Each commodity committee shall have the following powers and duties:

. . . .

(f) To submit as soon as practicable after the beginning of each fiscal year to the Secretary, for his approval, a budget of its expenses for such fiscal period, including its proportional share of the expenses of the Control Committee and an explanation of the items therein, and a recommendation as to the rate of assessment for the respective fruit for which the commodity committee was established.

. . . .

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of

the fruit for which the commodity committee was established *as the Secretary may determine to be appropriate.* The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 917.37.

§ 917.37 Assessments.

(a) *As his pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand, assessments on all fruit handled by him.* The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) *The Secretary shall fix the respective rate of assessment which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses which may be incurred during such period.* At any time during or after the fiscal period, the Secretary may increase the rates of assessments in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period.

. . . .

§ 917.39 Production research, market research and development.

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. *Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.*

With respect to petitioners' cross-appeal, I am in complete agreement with the ALJ's holding that notice-and-comment rulemaking is not required for the Secretary's approval of any of the Committees' expenses, including advertising expenses. The ALJ's views, which coincide with my own, are as follows ((Initial Decision at 338-44) (emphasis supplied by the ALJ); a few omissions (indicated by three dots) and additions (indicated by brackets) are by the Judicial Officer)):

> In order to understand the nature of the assessment claims, one must first appreciate the essential nature of Marketing Order Administrative Committees, which, of course, incur expenses in the administration of the Orders. In the case of the Committees under Marketing Orders 916 and 917, the expenses are of three general categories: Committee administration expenses (*e.g.*, office expenses; vehicle and travel expenses; wages and benefits for the Committees' paid staff, the California Tree Fruit Agreement; expenses for information collection, storage, compilation, dissemination; meeting expenses); research, promotion; and advertising expenses, which may include the cost of horticultural research; cost of marketing surveys and studies; cost of seeking new shipment and marketing techniques and outlets; cost of developing promotion and advertising programs and materials; costs of radio and television commercials and time; and inspection expenses (*i.e.*, primarily the wages and expenses of the inspectors for inspecting and grading the fruit). While expenses in all categories peak during the harvest and marketing periods, substantial expenses are incurred and must be paid over the entire year, particularly for administration, and research, promotion, and advertising. The Order 916 and 917 Committees are organized on a fiscal year basis which begins on March 1 of each year (7 C.F.R. §§ 916.79, 917.9). The Committees are required to develop and submit to the Secretary for approval a budget of their anticipated expenses for each fiscal year (7 C.F.R. §§ 916.31(c) and 917.35(f)).[14]

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[14] The exhibits and the testimony at the oral hearing, particularly of the Committees' Manager Jon Field, are replete with details of the type of studies and projects that are included in the budget. The hearing record

> A budget is discussed and approved at the May Committee meeting and sent to the Secretary. (Ex. 2, N-P-A; Ex. 3, P-1-B). The budget items are also described in detail in the Marketing Policy sent to the Department (Ex. 8, AMS- [2]-H). Various Field Office memoranda also contain information in this regard (e.g., Ex. 8, AMS-1, Memorandum of 5/20/87)
>
> . . . .

Therefore, the Secretary has before him a broad record of information and material *to be analyzed and considered when considering budget approval*. Furthermore, the Secretary has a background in the past projects and . . . their effectiveness under these and other Marketing Orders. The Secretary's review also starts from the premise created by the unchallenged formal rulemaking records that the funding of administrative, promotion and inspection activities is something desirable. Thus, the Secretary's decision to approve a budget is not lacking in reason and cannot be regarded as something that is arbitrary or capricious or lacking in substantial evidence.

I have not been convinced that budget approval by the Secretary is something that is required to be accomplished through rulemaking under the Agricultural Marketing Agreement Act. There is no requirement in that statute that the Secretary employ notice and comment for Committees' budgets[15] and any such requirement would have to be forthcoming from the provisions of the Administrative Procedure Act, or, partake of a "taxing"

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also reveals that there is a Research and Promotion Subcommittee (e.g., Ex. 22) that holds public meetings to develop and debate these projects and a Management Services Committee that coordinates the share of these joint expenses that are to be attributed to each of the regulated commodities.

[15] The Secretary's right to approve the budgets of the Committees without notice and comment rulemaking is the same as his right to approve, without notice and comment rulemaking, the budgets of his other agencies, such as the Office of Administrative Law Judges, the Office of the General Counsel, the Agricultural Marketing Service, its Fruit and Vegetable Division, or its Marketing Order Administration Branch.

function, which would be beyond the scope of the Secretary's powers. It is true that the budgets of these Committees [and other USDA agencies whose budgets are approved by the Secretary without notice and comment rulemaking] affect payments from others, whether they be general taxpayers, fruit handlers, or recipients of some other fee-based Government service. But in all cases this ultimately is a case of Secretarial discretion in approving the expenses of the Committees which in *themselves* impose no direct financial requirements on others. The Secretary is not forbidden from seeking further public input through a Federal Register publication regarding the budget of the Committees [or any of the Secretary's agencies] and . . . has done so on some isolated occasions. Much more typically, however, he has merely announced that the budget and certain expenditures of the Committees [or other agencies] have been approved and authorized. The key legal point, however, is that there is no requirement in the law that the Secretary seek notice and comment regarding such budget authorization.

The law does require that the levy of an assessment be done by means of a regulation. The *assessment is the imposition of a direct rule on handlers that they pay a fixed amount of money pro rata or find themselves in violation of law and subject to criminal and civil sanctions*. In setting this assessment rate, the Secretary, while subject to requirements under the Administrative Procedure Act, is also subject to the requirements of the Agricultural Marketing Agreement Act and the Marketing Orders. Section 10(b)[(ii)] (iii)) of the Agricultural Marketing Agreement Act (7 U.S.C. §§ 610(b)[(ii),] (iii)), provides that each handler subject to a Marketing Order shall pay a *pro rata* share of the expenses of the Committee, *which are approved by the Secretary*, during the entire period. The Marketing Orders in question (7 C.F.R. §§ 916.41, 917.37) follow this requirement of the Agricultural Marketing Agreement Act by requiring each handler to pay his *pro rata* share of all expenses during the fiscal period (March 1 through February 28 or 29) based on each handler's shipments during the fiscal period. The [unchallenged] formal rule making record indicates that, in furtherance of this *pro rata* requirement, *it was determined to have inspection expenses borne by the Committee, lest each handler have to contract separately for Inspection Service and pay*

a different rate because of factors such as the handler's location (23 Fed. Reg. 3016-3017 [1958]). The Marketing Order provisions, based on the [unchallenged] formal rulemaking records, also implement the requirements of the Agricultural Marketing Agreement Act by specifically providing that assessments will be *levied retroactively* for the entire fiscal period to ensure that each handler pays his *pro rata* share of the expenses. Furthermore, the Marketing Orders anticipate that the assessment rate will not be promulgated by the Secretary at the beginning of each fiscal period. The Orders (7 C.F.R. §§ 916.31(c), 917.35(f)) specify that the Committees will meet *after* the beginning of the fiscal period to determine their budget of expenses for the fiscal year. Since the Secretary also needs an opportunity to review the budget before approving all of the expenses, the Marketing Orders require that the assessment regulation will always be enacted with a retroactive effective date. Furthermore, in accord with the Agricultural Marketing Agreement Act and the [unchallenged] formal rule making record, the Marketing Orders specify that the assessment rate will be determined by a simple mathematical calculation, dividing the total anticipated expenses by the total anticipated shipments (7 C.F.R. §§ 916.41, 917.37). Under the same provisions of the Marketing Orders, supplemental assessment rates may be enacted later during the fiscal year, and must be applied retroactively to each handler for the entire fiscal year, if either the anticipated expenses or the anticipated shipments change during the year. (*See also* 23 Fed. Reg. 3014 [1958].) In order to avoid the burdens and confusion of issuing several supplemental assessments during each year, both Marketing Order Committees and the Secretary tend to prefer having the most accurate crop estimates before the issuance of the rate regulation. Finally, it should be noted that while the Committees send out billings before the enactment of the rate regulation based on the anticipated rate, no handler is legally required to pay such a billing until the rate regulation is enacted. Most handlers, however, find it more convenient to pay as they go, rather than be faced with one big billing that retroactively includes all shipments from the beginning of the fiscal year. Obviously, adjustments are made if the Secretary enacts a lower rate.

In summary, therefore, Petitioners' claims regarding assessment collection lack merit in this proceeding . . . . Notice and comment . . . is regarded as impracticable and unnecessary since both the Agricultural Marketing Agreement Act and the Marketing Orders *require* that the assessment rate be derived by dividing the expenses by the shipments. There is no discretion in this regard, nor is there any discretion as to the period the rate will apply to, or, as to whether all handlers should pay the same rate. Thus, the statute and the Orders leave no issue unresolved on which meaningful comment could be submitted unless it would be by means of allowing interested parties the opportunity to contest the necessity and/or the amount of certain budgeted items, such as advertising and promotion. By approving the Committees' budgets, the Secretary has indicated he approves of their expenditures. [Furthermore, interested parties have the opportunity to air their views as to all relevant matters at public meetings held under the Marketing Orders.]

This same analysis is equally applicable to the assessment regulations for prior years. (Ex. 5-C and the materials cited therein.) The challenge of Petitioners to the collection of assessments, therefore, has no legal basis. [This is reinforced by the fact that supplemental assessment rates can be issued if actual expenses or shipments change and the Act and the Orders require any such supplemental rates to be applied retroactively to all handlers on the same basis. Hence, it is clear that good cause exists for dispensing with notice and comment rulemaking.[16]]

Petitioners are essentially arguing the desirability of spending Order money for advertising. But the Marketing Orders in question (7 C.F.R. §§ 916.45, 917.39) expressly authorize spending assessment monies for advertising. Since petitioners have not challenged the formal rulemaking records that determined the desirability of those Order provisions, they are barred from

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[16] The 1987 assessment regulation applicable to 10 Marketing Orders (including plums and nectarines) succinctly states the foregoing requirements of the Act and the Marketing Orders (52 Fed. Reg. 31,375 (1987)). Thus, it notes a substantial basis for the actions taken and the invocation of the good cause provision.

litigating the question of whether these particular Marketing Orders should contain such provisions. *In re Sequoia Orange Co.*, 41 Agric. Dec. 1511, 1521-23 (1982), *order transferring case,* No. 82-2510 (D.D.C. June 14, 1983), *aff'd*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983). Petitioners' argument regarding the desirability of advertising is not justiciable herein.

Petitioners contend that the Secretary's approval of the budget item for advertising is different from the approval of all other budgetary expense items since the determination as to whether to approve advertising is discretionary. But every item in the budget is discretionary. For example, the number of employees hired by the Committees, and their salaries, are entirely discretionary with the Secretary. It is entirely discretionary as to whether the Secretary permits the Committees to rent office space. The Secretary could, if he chose, require the Committees to work out of their homes (exchanging information through personal computers and Fax machines), and require them to rent a hotel conference room if personal meetings are needed. The Secretary could require the Committees' staff to use only Committee-owned cars on Committee business or, conversely, the Secretary could require them to use their own cars, with a mileage reimbursement. In short, every aspect of the budgetary process is discretionary. That is why every aspect of the budgetary process requires the Secretary's approval. Expenses for advertising are no different, in this respect, from any other Committee expenses incurred in connection with the Marketing Order programs. No Secretarial approval of budget items requires notice-and-comment rulemaking.

Although the *approval* of the budget items is not subject to the Administrative Procedure Act, after the Secretary has approved the budget items (which, under the Agricultural Marketing Agreement Act, *requires* every handler to pay his *pro rata* share of the approved expenses), the Secretary publishes the actual assessment rate as a final rule, invoking the "good cause" exception to the Administrative Procedure Act (5 U.S.C. § 553(b)) for not engaging in notice-and-comment procedures. This is entirely appropriate since the law requires that the assessment conform with a ministerial calculation. In these circumstances, the cases cited by petitioners are inapposite to the situation here. At the time of the publication of the final rule setting forth the assessment rate, all

discretionary budget determinations have previously been made, and the budgetary-approval process is not subject to the Administrative Procedure Act. Since the final rule announcing the assessment rate sets forth a statutorily-required ministerial calculation, good cause exists for dispensing with notice-and-comment rulemaking. As shown above, however, the Secretary has access to a large amount of data and recommendations with respect to all items of the budget, including the minutes of the public meetings at which the budget is discussed.

END OF EXCERPT FROM WILEMAN I

The tree fruit orders involved in *Wileman I*, quoted above, are analogous to the Almond Order involved here. The Nectarine Order provisions discussed in *Wileman I* are set forth below, followed immediately by the analogous provision of the Almond Order.

A. Section 916.3[l]: "The committee shall have . . . the following duties:

(c) To submit to the Secretary as soon as practicable *after the beginning of each fiscal period* . . . a budget . . ." (emphasis added).

Section 981.80 of the Almond Order provides: "The recommendation of the Board as to the expenses for each such year . . . shall be submitted to the Secretary *on or before August 1 of the crop year* . . ." Because the crop year begins July 1, this is equivalent to "after the beginning of the crop year." In addition, § 981.81(a) states:

> At any time during or after a crop year, the Secretary may increase the rate of assessments to apply to all such almonds during such crop year to secure sufficient funds to cover the expenses authorized by § 981.80 or by any later finding by the Secretary relative to the expenses of the Board, and such additional assessments shall be paid to the Board by each handler on demand.

B. Section 916.40 — "The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred . . . ."

Section 981.80 provides: "The Board is authorized to incur such expenses as the Secretary may find are reasonable and likely to be incurred . . . ."

C. Section 916.41(a) — "As his pro rata share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period shall pay to the committee, upon demand, assessments on all nectarines so handled . . . . (b) The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses."

Section 981.81 provides: "Each handler shall pay to the Board on demand by the Board, from time to time, such sum . . . based on such rate per pound of almonds . . . as the Secretary finds is necessary to provide funds to meet the authorized board expenses and the operating reserve requirements . . . ."

D. Section 916.45 — "Such [production research, marketing research and development] projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41."

Section 981.41 provides: "The Board, with the approval of the Secretary, may establish . . . production research, marketing research and development projects, and marketing promotion including paid advertising . . . . The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) . . . ."

The Plum Order provisions relied on in *Wileman I* (7 C.F.R. Part 917) are also similar to the provisions of the Almond Order.

For the reasons set forth in *Wileman I*, the Secretary was not required to promulgate the assessment rates, including the creditable portion thereof, by notice-and-comment rulemaking.[21]

Even if the Secretary's failure to engage in notice-and-comment rulemaking with respect to the assessment rates for the 1980-81 through the 1986-87 crop years were error (which is not the case), the appropriate remedy would be to remand the matter to the Secretary, so that the Secretary could now engage in notice-and-comment rulemaking with respect to each crop year, and retrospectively establish the appropriate assessment rate for each year, upon the basis of the comments received (see § I, Additional Conclusions by the Judicial Officer, excerpt from *Wileman I*). It would be a drastic and unconscionable remedy to completely invalidate the assessment rates for 7 years, and hold that, as a result of the Secretary's failure to comply with the notice and comment provisions, handlers were not obligated to pay any assessments for those 7 years.

The expenses for those 7 years have already been incurred on the basis of the Order and the regulations. There is no ready source of funds to repay all the handlers who would be entitled to repayment, under a holding that the assessments were invalid, with no opportunity to correct the mistake. The assessment rates for the 7 years produced approximately 72.3 million dollars (RX 94, 96, 103, 106, 110, 115, 119). If petitioners are entitled to a repayment of their assessments (or to be relieved from the obligation to pay any assessments not already paid), every other handler regulated by the Order may be entitled to the same relief. The Secretary would certainly have to consider whether he should voluntarily repay the assessments to all handlers for all or some of the years involved. There is no statute of limitations applicable to the filing of a

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[21] Petitioners also contend that the notice period allowed by the Secretary to comment was too short for the 1987-88 and 1988-89 crops, but since no notice period is required, their contention is without merit. In any event, the 10- and 12-day comment periods were sufficient, given the facts that the assessment rate is merely determined by dividing the total approved expenses by the estimated production, and handlers knew long in advance of the comment periods what recommendations had been made by the Board.

§ 8c(15)(A) proceeding by any almond handler regulated by the Order. Unless laches were held to be applicable to some of the earlier years (as to petitioners and other handlers), all other handlers could still file § 8c(15)(A) proceedings as to this same issue.[22] Even in the absence of such § 8c(15)(A) petitions, the Secretary would have to consider whether he should voluntarily reimburse all other handlers for all or some of the years.

If the Secretary were to determine that other handlers should be reimbursed for all or part of the assessment obligations during the 7 years, the only source of funds would be through an increase in the Board's budget for the year in which repayments are to be made. That is, handlers in the repayment year would pay an assessment rate that would provide funds not only for the current year but for the 7 years involved in this case. Instead of the typical assessment rate of about 2.8¢ per pound, the assessment rate for the repayment year would be about eight times that amount, or 22.4¢ per pound (2.8 x 8 = 22.4). If all handlers in the repayment year handled the same proportionate part of the almond crop as they did during the 7 years involved here, each handler would merely be providing sufficient money to the Board to repay himself. Any handler whose proportionate part of the total crop was greater during the repayment year than during the 7 years involved here would pay more than he received as reimbursement. Any handler who received repayment for those 7 years who was no longer in business (and would, therefore, pay no part of the repayment-year's budget), or whose proportionate part of the almond crop in the repayment year was less than during those 7 years, would receive more than he paid to the Board.

The effect of increasing the repayment year's assessment rate to approximately 22.4¢ per pound would have to be carefully considered by the Secretary. Could this rate be passed on to producers, or to the buyers? If so, what would it do to producers

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[22] In my view, laches should apply to any assessment obligation as to which a § 8c(15)(A) petition is not filed within 2 years after the Secretary's issuance of the assessment rule. *Cf.* 7 C.F.R. § 1000.6 (providing 2-year period for the termination of obligations under milk marketing orders).

or to the demand for almonds? If it could not be passed on, could the handlers afford to pay such an assessment rate, even though most, if not all, of the handlers, would be getting a substantial part of it back from the Board? Until the possibility of an extraordinary expense budget to repay handlers' assessment monies is ended, will handlers be able to sell their businesses to others? Could the Secretary now lawfully establish a statute of limitations, that would cut off the existing rights of handlers who paid assessment obligations during the period involved here, without giving them a reasonable opportunity to file a § 8c(15)(A) proceeding?

The difficulties that would be presented, if the failure to engage in notice-and-comment rulemaking required complete invalidation of the assessment rates for the 7 years in question, strongly support the remedy of permitting the Secretary to correct his error by retrospective rulemaking, through engaging in notice-and-comment rulemaking as to these 7 years at this time, and issuing the retrospective assessment rates that he would have issued, based on all of the knowledge gained through the notice-and-comment rulemaking proceedings.

Another reason supporting the retrospective rulemaking approach is the fact that the failure to engage in notice-and-comment rulemaking, if it were required by the APA, is a technicality that is not likely to produce any new information not known to the Secretary through the public-meeting approach and Committee-and-Board-meeting approach now followed under the program. The regulated industry is relatively small (there are just over 100 handlers) and highly knowledgeable as to the public meetings and other means that are employed to acquaint the Secretary with all of the facts influencing his ultimate decisions. The same things happen each year at about the same time, and they are widely publicized in industry circles. Furthermore, the assessment rate does not change drastically from year to year, absent some significant program change. For example, in the 7 years involved here, the assessment rates were 2.8¢, 2.85¢, 2.85¢, 2.85¢, 2.78¢; 2.7¢, and 2.6¢, all "less any amount credited pursuant to § 981.41 but not to exceed 2.5¢ per pound." (The creditable assessment figure of 2.5¢ per pound did not change at all during the 7 years.) Considering all of the information available to the Secretary from industry meetings and Board and Committee recommendations, it

is not realistic to believe that the Secretary would have changed the assessment rate, including the creditable portion thereof, if notice-and-comment rulemaking had been engaged in. But if it is held that the Secretary's failure to engage in notice-and-comment rulemaking was fatal error, the only reasonable remedy is to remand the proceeding so that the Secretary can retrospectively issue the appropriate assessment rates for those 7 years based upon the knowledge derived from the new notice-and-comment rulemaking. If a reviewing court should disagree with this view, consideration should also be given as to whether any reimbursement is just and reasonable, considering all of the facts and circumstances (see the quotation from *Wileman I*, set forth in § I of the Additional Conclusions by the Judicial Officer).

VI. The Rules Imposing the Assessment Rates From 1980-81 Through 1988-89, Each of Which Was Issued after the Handling of Almonds Had Begun for the Crop Year, Were Not Invalid Retroactive Regulations.

The ALJ held that the rules imposing the assessment rates from 1980-81 through 1988-89, issued after the handling of almonds had begun for each crop year, were retroactive in effect and therefore invalid. The ALJ concluded (Initial Decision at 74-82):

Respondent explains in its brief that the Order provides that the Board will submit its budget of expenses for the crop year starting on July 1, to the Secretary by August 1. 7 C.F.R. § 981.80 (1989). This timetable is necessary in order to permit crop estimates which are done in July. The Secretary needs time to review the budget and as a result "the assessment regulation will normally be enacted with a retroactive effective date." (Respondent's Brief, p. 77) As a result of this statement by Respondent, in a Post-Hearing Order, I requested the parties to respond to the following question:

> 3. In *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-5 and 981-6, Chief Administrative Law Judge, Victor W. Palmer, decided that a rulemaking action of the Secretary was not in accordance with law since it was retroactive. Judge Palmer, quoting Supreme Court Justice Kennedy in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204,

109 S. Ct. 468 (1988), explained that retroactive rulemaking is invalid without an express statutory grant and that "there is no express provision for retroactive rulemaking in the Agricultural Marketing Agreement Act." Should the decision in *In re Cal-Almond, Inc.* be applied to the assessment regulations discussed by Respondent at page 77 of his brief in this case? Please discuss.

In *Cal-Almond*, Judge Palmer, held that the Secretary's rulemaking action requiring handlers to hold in reserve 25% of the almonds handled during the 1988-89 crop year was not in accordance with law because it was retroactive. *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-5 and 981-6, March 19, 1990. The final rule was published on January 25, 1989, and applied to all almonds received by handlers from July 1, 1988, to June 30, 1989. Judge Palmer relied on the Supreme Court's decision in *Bowen*, that retroactive rulemaking is invalid without an express statutory grant:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result . . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms . . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

Bowen, 109 S. Ct. at 471 (citations omitted). Judge Palmer found that there was no express grant in the AMA providing for retroactive rulemaking. Judge Palmer also noted that the respondent's argument that the petitioners had conducted their operations as if a reserve would be required was irrelevant, as this was not a factor for determining whether a rule was improperly retroactive, under *Bowen*.

Petitioners adopted Judge Palmer's reasoning in their Response to the Post-Hearing Order. Petitioners explain that in each crop year from 1980 through 1989, the Board recommended the budget

and assessment rates in their July meeting, shortly after the crop year had begun, but before the handlers received almonds for that crop year. However, the Secretary did not always issue the rule before the handlers received almonds. In 1980, the Secretary issued a final rule, without issuing a proposed rule, on August 26, 1980. (RX 94) In 1981, the Secretary issued a final rule, without issuing a proposed rule, on September 24, 1981. (RX 96) In 1982, the Secretary issued a final rule, without issuing a proposed rule, on October 19, 1982. (RX 103) In 1983, the Secretary issued a final rule, without issuing a proposed rule, on October 5, 1983. (RX 106) In 1984, the Secretary issued a final rule, without issuing a proposed rule, on September 27, 1984. (RX 110) In 1985, the Secretary issued a final rule, without issuing a proposed rule on September 9, 1985. (RX 115) In 1986, the Secretary issued a final rule, without issuing a proposed rule, on October 17, 1986. (RX 119) In 1987, the Secretary issued a proposed rule on July 28, 1987, and issued the final rule on December 1, 1987, authorizing the 2.5 cents per pound credit. (RX 125, 126) The Secretary did not approve the budget and assessment rate until a proposed rule was issued on January 7, 1988, and a final rule was issued on April 14, 1988. (RX 132, 133) For the 1988 crop year, the Secretary issued a proposed rule on September 16, 1988, and a final rule on October 31, 1988. (RX 1369 137)

Petitioners contend that the Secretary had sufficient time to review the budget and assessment rates and issue a rule prior to the handling of almonds in a crop year. The handling of almonds commences in September. Petitioners argue that the Secretary intended that regulations affecting almond crops be in place before handlers began receiving the crop. In fact, as Judge Palmer discussed in *Cal-Almond*, the Secretary had selected July 1 as the beginning date for the crop years to allow ample time for consideration of Board recommendations before the actual handling of almonds commenced for the crop year. The Secretary explained in the Recommended Decision:

> The term "crop year" should be defined to mean the 12 months from July 1 through June 30. The harvesting of almonds begins in August, and sales or deliveries of almonds to handlers by growers may begin as early as September. Sales continue into the next calendar year, and usually reach

> their lowest level in July. It is desirable to have the crop year begin a sufficient time prior to the beginning of harvest to permit the preparation and issuance of appropriate regulations to govern the handling of the coming crop, and it is concluded that July 1 would be a proper beginning date from this standpoint.

15 Fed. Reg. 3623, 3628 (1950).

Petitioners argue that the Secretary has never justified why it takes so long to issue the rule, nor has he ever justified applying it retroactively. Petitioners assert that the Secretary had sufficient time to issue a proposed rule, with a shortened comment period, and a final rule before the handlers received the crop. In the alternative, the Secretary could have issued an interim final rule approving the assessment rate, and later issued a final rule. The effect of the retroactive rules were to apply the assessment rate upon almonds received by handlers prior to the Secretary actually imposing the rate of the assessments. Petitioners contend that the assessments should not apply with respect to almonds received by them before the Secretary issued a final rule for each of the crop years in question.

Respondent argues that the decision in *Cal-Almond* is incorrect with regard to the assessment regulations and should not be applied in this case. The decision in *Cal-Almond* considered the wrong rule. The rule authorizing the reserve was the proper rule to be reviewed and not the rule setting the reserve amount. The rule authorizing the reserve created the legal obligation to withhold a reserve, while the rule setting the amount did merely that, set the amount.

Respondent argues that in the present case, the rule in question is the rule requiring the handler to pay assessments, 7 C.F.R. § 981.81 (1989), not the annual rule approving the Board's budget and setting the assessment rate, that creates the obligation. The annual rule merely authorizes the expenditures by the Board. Since section 981.81 was properly promulgated, and is prospective in its application, there is no retroactivity problem.

Respondent explains that the Supreme Court disfavored the retroactive effect of the rule in *Bowen* because it resulted in an

"unreasonably harsh action." *Bowen*, 109 S. Ct. at 471 (quoting *Brimstone R. Co.* v. *United States*, 276 U.S. 104, 122 (1928)). Respondent asserts that the application of the assessment rate to almonds handled prior to the promulgation of the rate, was not harsh. Respondent argues that handlers knew each year in February what the Board's tentative proposed assessment rate would be. Further, there was no evidence that the handlers would have altered their activities with regard to the assessment rates. There was prior notice of the formula for calculating the assessment rate, as provided in the Order. The estimated crop is divided into the approved budget and applied to the almonds handled during the crop year.

Respondent argues that Justice Scalia's concurrence supports its position that the assessment rule is valid. Justice Scalia discussed the APA at length. He noted that under the APA, rules which must be prospective are "primarily concerned with policy considerations." *Bowen*, 109 S. Ct. at 477. The policy of assessments is implemented by section 981.81 and is prospective, although it has an affect on past transactions, *i.e.*, the almonds handled the first few months of the crop year. Justice Scalia notes that this effect on past transactions is permissible, provided it is not a change in past law. *Id.* at 477-78.

Respondent argues that if the rule is found to be retroactive, it is not invalid, as the AMAA provides for retroactive rulemaking. The AMAA provides that each order:

> [S]hall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, *during any period specified by him* . . . .

7 U.S.C. § 610(b)(2)(ii) (1988).

I find that the rules imposing the assessment rate, that were promulgated after the handling of almonds had begun for that crop year, were retroactive in effect and therefore invalid.

Respondent contends that the regulation at issue is section 981.81. Section 981.81 provides in relevant part:

> (a) Requirement for payment. Each handler shall pay to the Board *on demand by the Board*, from time to time, such sum less any amounts credited pursuant to § 981.41, based on such rate per pound of almonds, kernel weight basis, received by him for his own account (except as to receipts from other handlers on which assessments have been paid) *as the Secretary finds is necessary* to provide funds to meet authorized board expenses and the operating reserve requirement, and *establishes for the crop year* . . . .

7 C.F.R. § 981.81(a) (1989) (emphasis added). Section 981.81 does not compel the handler to pay an assessment until the Secretary directs the handler to pay. Section 981.81 clearly authorizes the Secretary to impose an assessment. However, the legal obligation to pay is not imposed until the Secretary directs that an assessment is necessary for the crop year and determines the amount of the assessment.

Justice Scalia concluded that the APA clearly requires prospective rulemaking. Section 551(4) of the APA requires a rule to have a "future effect" and further provides for the "approval or prescription *for the future* of rates . . . ." *Bowen* 109 S. Ct. at 475-80; 5 U.S.C. § 551(4) (1988) (emphasis added). Justice Scalia stated:

> It seems to me clear that the phrase "for the future" — which even more obviously refers to future operation rather than a future effective date — is not meant to add a requirement to those contained in the earlier part of the definition, but rather to repeat, in a more particularized context, the prior requirement "of future effect."

Id. at 476. Therefore, unless the AMAA provides for retroactive rulemaking, the Secretary has no authority to issue rules retroactively.

Section 10(b)(2)(ii) of the AMAA does not permit retroactive rulemaking, but in fact uses prospective language. Section 10(b)(2)(ii) states that handlers may be assessed pro rata for expenses, that the Secretary may "determine to be appropriate" and "are likely to be incurred" by the Board. 7 U.S.C. § 610(b)(2)(ii) (1988). The phrase "during any period specified by him" in no

way suggests that Congress intended the AMAA to authorize retroactive rulemaking. The phrase seems to imply that the Secretary may determine the length of time for which a budget will apply, where the Secretary has determined the expenses likely to be incurred by the Board. In the Order, the Secretary has decided that a budget will apply from July 1 to June 30 of each crop year. As the Court explained in *Bowen*, the authorizing statute must specifically provide for retroactive rulemaking. Express language allowing retroactive rulemaking is needed.

Petitioners explain that if Respondent's argument that the Secretary can impose the assessment rate at any time is carried to its logical extreme, then the Secretary could wait until the end of the year and impose an assessment rate, or wait a year, two years, and impose a rate for all of the previous years making it retroactive and compelling handlers to pay the assessment. The APA and the Court in *Bowen*, make this assertion invalid.

Respondent's argument that the handlers were on notice as early as the February proceeding the crop year as to what the recommended assessment rate would be is rejected. Notice is not relevant. *Bowen*, 109 S. Ct. at 475. Respondent makes the process sound automatic that the Board determines the assessment rate, and the Secretary then imposes the rate. This is not the case. The Board is to determine its budget and make a recommendation to the Secretary of the assessment rate, based on the estimated expenditures of the Board. The Secretary is then supposed to review this material and approve or disapprove as he determines is necessary. Thus, the assessment rate could be changed, or the Secretary could even decide not to impose an assessment rate. Handlers should not have to start a crop year under the assumption that an assessment might be imposed, but are entitled to notice that an assessment will be imposed. The Secretary could accomplish this by interim rulemaking, or by providing for a shortened notice and comment period to allow for promulgation of the rule prior to the handling of almonds.

Respondent mischaracterizes Justice Scalia's discussion of "secondary" retroactivity. Justice Scalia states:

> A rule with exclusively future effect (taxation of future trust income) can unquestionably *affect* past transactions (rendering

> the previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA.

Bowen, 109 S. Ct. at 477. In *Bowen*, the Secretary of Health and Human Services changed the law retroactively while a prior rule was in effect. This is not permitted by the APA. *Id.*

> Here the rule at issue is the rule establishing the assessments, which is enacted annually. There is no rule in effect until the adoption of the rule establishing the assessment for that crop year, and as a result the promulgation of that rule changes the law. It imposes an assessment where there was none. This is precisely the situation prohibited by the APA.

The assessment rates established each year relevant here, and the creditable portion thereof, are set forth in the following table (RX 94, 96, 103, 106, 110, 115,119,126, 133,137):

Assessment Rates and Creditable Portion Thereof

Crop Year	Assessment Rate	Creditable Portion
	Cents Per Pound	Cents Per Pound
1980-81	2.8	2.5
1981-82	2.85	2.5
1982-83	2.85	2.5
1983-84	2.85	2.5
1984-85	2.78	2.5
1985-86	2.7	2.5
1986-87	2.6	2.5
1987-88	2.8	2.5
1988-89	2.65	2.5

No one who has any in-depth familiarity with the Almond Marketing Order Program would deny the fact that petitioners have no real interest in the retroactivity issue, except insofar as they hope to avoid their assessment obligations because of what they regard as fatal error. As a practical matter, it makes no difference whatever to petitioners whether they know the exact assessment rate and creditable portion thereof before they actually receive almonds in a marketing year. The assessment rate and creditable portion do not change materially from year to year. In fact, the creditable portion has been exactly 2.50 per pound from 1980-81 (and at least

for the year before that), until the present. The assessment rate has not varied by more than a quarter of a cent per pound during those years. There are only slightly over 100 handlers regulated by the Order, and those handlers are well aware of the fact that an assessment will be in effect each year, unless the program is terminated, and they are well aware of the Board's recommendation as to the assessment rate, including the creditable portion thereof, made in about February of each year. Whether the Secretary later changes the Board's recommendation by a tenth of a cent, or so, would have no effect whatever on a handler's business decisions. Even if the Secretary's determination was a cent or two different from the Board's recommendation (which would never be expected to happen, in practice), that would not affect a handler's business decisions. (The rate is the same for all of a handler's competitors, and the total assessment is so small compared to the value of the almonds that a handler would not change his personal production or his handling for others because of the assessment rate.) Accordingly, this issue should be seen as it actually is — an attempt by petitioners to find some legal technicality to relieve them from all assessment obligations during this period.

It is significant that although petitioners' Amended Petition alleges a multitude of reasons why the assessment rate regulations (including the creditable portion thereof) are unlawful, petitioners do not allege retroactivity as one of the grounds. In addition, in The Parties' Joint Submission of Issues to be Decided, filed March 29, 1989, the retroactivity issue was not raised. Hence "retroactivity" is a legal afterthought, having no real effect on petitioners.

Furthermore, petitioners' failure to raise the retroactivity issue in their Amended Petition precludes us from considering the matter in this § 8c(15)(A) proceeding. As stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, slip op. at 52-53 (Apr. 12, 1990), *appeal docketed*, No. CIV-90-688 T (W.D. Okla. May 1, 1990):

> In addition to disagreeing with the ALJ on the merits of the Notice of Hearing issue, I disagree with the ALJ on procedural grounds. That is, I believe that it was inappropriate for the ALJ to hold that the Notice of Hearing (and therefore the amendatory order) was invalid on the basis of a sentence

in the Notice of Hearing not relied upon by the petitioner. It should be noted that this is not the typical proceeding brought before the ALJs whereby the Department is the complainant, and the ALJ might appropriately note *sua sponte* a ground of *defense* not noticed by the respondent's counsel. Rather, a § 8c(15)(A) proceeding is instituted by a private party, who is responsible for framing the issues. Under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)), only a handler may file "a written petition" challenging an order, or any provision thereof, after which the handler shall be given opportunity for a hearing "upon such petition, in accordance with regulations made by the Secretary," and with a ruling made "upon the prayer of such petition . . . ." Neither the statute nor the Rules of Practice authorize an ALJ or the Judicial Officer to challenge an order or a provision thereof upon a basis not raised by the handler [in the petition]. The Rules of Practice require the petition to specifically state the "grounds" for the challenge (7 C.F.R. § 900.52(b)(4)), limit the evidentiary record to matters relevant and material to those grounds (7 C.F.R. § 900.60(d)), and require the ALJ to base his decision on that record (7 C.F.R. § 900.64(c)).

Even though the petitioner contested the adequacy of the Notice of Hearing in its petition, petitioner did not rely on the ground relied upon by the ALJ in holding that the Notice of Hearing was inadequate. Accordingly, I believe that it was error for the ALJ to raise *sua sponte* the issue as to whether the sentence limiting the receipt of evidence "to the economic and marketing conditions which relate to the location adjustment provisions of the proposed merged and expanded Southwest Plains marketing area" precluded the receipt of evidence on the issue as to whether Lincoln County should be placed in Zone I.

Since Congress gave the Secretary jurisdiction only to rule "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A)), neither the ALJ nor the Judicial Officer has jurisdiction to rule upon an issue not raised in the Petition or Amended Petition.

But even if the retroactivity issue can be considered, in the excerpt from *Wileman I*, quoted in § V of the Additional

Conclusions by the Judicial Officer, the explanation supports the view that there is no invalid retroactivity involved here (even though retroactivity is not directly raised in *Wileman I*). In addition, it is explained in § V of the Additional Conclusions by the Judicial Officer that the Almond Order clearly authorizes the issuance of retroactive assessment regulations. Those Order provisions were issued on the basis of a formal rulemaking record, and there is no challenge as to the evidentiary support for those provisions. In addition, I am in agreement with the views set forth in Respondent's Reply to Judge Bernstein's Post-Hearing Order at 2-8, insofar as they relate to the issue involved here (leaving aside any determination as to whether those views are also correct with respect to the issue now pending on appeal in *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-6), which are as follows:

3. In *In re Cal-Almond, Inc.*, 89 AMA Docket No. F&V 981-6, Chief Administrative Law Judge, Victor W. Palmer, decided that a rulemaking action of the Secretary was not in accordance with law since it was retroactive. Judge Palmer, quoting Supreme Court Justice Kennedy in *Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468 (1988), explained that retroactive rulemaking is invalid without an express statutory grant and that "there is no express provision for retroactive rulemaking in the Agricultural Marketing Agreement Act." Should the decision in *In re Cal-Almond, Inc.* be applied to the assessment regulations discussed by Respondent at page 77 of his brief in this case? Please discuss. [This is the ALJ's issue discussed below by respondent.]

The decision in *Cal-Almond* is wrong with regard to assessment regulations and thus should not be applied to this case.[1] The following points, which are discussed more fully hereafter, explain why this is so. The assessment rule is *not* retroactive. Furthermore, [regar]dless of how the rule is characterized, the decision in *Georgetown Univ. Hosp.* does not apply to the situation of the AMAA and the marketing orders thereunder. Finally, even if the rule were held to be retroactive and the *Georgetown Univ.*

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[1] The respondent in *Cal-Almond* is currently appealing the decision in that case to the Judicial Officer.

Hosp. case were found to apply, the Secretary's rule is valid as it is authorized by the statute.

The crucial flaw in the *Cal-Almond* decision is that it looks at the wrong rule. The rule in question is section 81 of the Almond Marketing Order (7 C.F.R. § 981.81). That rule is prospective only. It is that rule that imposes a legal obligation on a handler, requiring a handler to pay assessments. The annual rule approving the Board's budget and setting out the assessment rate does not create the obligation. A review of the *Georgetown Univ. Hosp.* (hereinafter *G. U. Hosp.)* case demonstrates that the marketing order provision, i.e., section 81, is the equivalent to the rule the Supreme Court was discussing with regard to the Secretary of HEW.

In that case, the Secretary of HEW had promulgated a rule changing a *procedure* for determining the amount of reimbursement a hospital would receive under certain Medicare provisions. The change involved the so-called wage-index rule and held that wages paid by Federal Government hospitals would be excluded from the computation. After the District Court held the change to the rule invalid (for failing to provide notice and comment),[2] the Secretary of HEW sought to repromulgate the change with notice and an opportunity to comment and to have the change apply retroactively to the time when it would have begun had it not been ruled invalid. (*G. U. Hosp.*, *supra*, at 470-71). In our case, the Secretary properly promulgated section 81 which establishes the procedure for assessments and then applied it only prospectively. In addition, unlike the medicare case, there was no change to an existing rule, only an arithmetic implementation of that rule.

The following hypothetical concerning the Almond Order will demonstrate the situation with which the Court in the *G. U. Hosp.* case was concerned, contrasting it with the situation in *Saulsbury*. Section 441(c)(4)(ii) of the Order (7 C.F.R. § 981.441(c)(4)(ii)), provides that a handler may receive credit for advertising in certain

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[2] The Secretary of Agriculture not only provided notice with regard to the promulgation of 7 C.F.R. § 981.81, but issued that rule only after a formal APA on-the-record hearing at which all interested persons could comment and participate.

specified foreign countries. Assume the Secretary amends that rule by deleting West Germany from the list of approved countries as of July 1, 1990, (as the Secretary of HEW amended her wage index rule to delete Federal hospitals). One year later, Handler Doe brings a proceeding under section 15 of the AMAA (7 U.S.C. § 608c(15)), challenging the deletion and the Board's refusal to give him credit for expenditures in West Germany during the 1990-91 crop year. A court issues a final order holding that the rule deleting West Germany was not in accordance with law as it lacked adequate support in the record (as the Court in *District of Columbia Hospital Ass'n v. Heckler*, No. 82-2520, cited in *G. U. Hosp.*, *supra*, at 470, held with regard to the Secretary of HEW's change to her wage index rule). Assume the Board then pays back to Doe the amount of credit he would have received for his expenditures in West Germany. The Secretary, in 1991, then repromulgates the deletion of West Germany and directs that it be effective retroactively to July 1, 1990. He then seeks to force Doe to repay to the Board the amounts he spent in West Germany in 1990 which are retroactively not creditable (again, this is just what happened in *G. U. Hosp.*). Such a rule would be impermissible, but is inapposite to the situation in *Saulsbury*.

In *Saulsbury*, the Secretary properly promulgated 7 C.F.R. § 981.81 well before applying it to any almonds. *Subsequently*, handlers were required, by section 81, to pay assessments on all almonds handled (based on the rate established by the yearly budget). There was no change in procedure or impact. Moreover, no handler altered, nor is there any assertion that any handler would have altered, his activities as a function of the assessment rate. In fact, the handlers knew each year in February what the Board's tentative proposed assessment rate was to be. (The Judicial Officer has held that the Secretary should give great weight to the recommendations of the industry groups involved in the implementation of marketing orders, *In re Sequoia Orange Co., Inc.*, 4[7] Agric. Dec. [2, 186] (1988) *[, aff'd in part and remanded sub nom. Riverbend Farms, Inc.* v. *Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989)].)

A further analysis of the *G. U. Hosp.* decision reveals many other instances which prove that the Court's decision applies to a rule such as section 81 (7 C.F.R. § 981.81) and not the rule

approving the Board's budget and establishing a corresponding assessment rate. Justice Kennedy cites *Brimstone R. Co.* v. *United States*, 276 U.S. 104, 122 (1928) for the proposition that the reason that retroactive rules are disfavored is to prevent "unreasonably harsh action" [109 S. Ct. at 471]. Nothing about the application of the assessment rate to almonds handled in the period before the precise rate is announced is harsh. Handlers know that there will be an assessment pursuant to 7 C.F.R. § 981.81. They know approximately what the rate will be as a result of the tentative rate listed by the Board in February. Furthermore, the Court relied on legislative history that indicated that providers should know in advance the basis or *procedure* for establishing the rate of reimbursement (although not the actual amount). That is precisely what is accomplished by the Almond Order where an almond handler knows the procedure and basis for his assessment. The mathematical calculation of dividing the estimated crop into the approved budget and applying it to all almonds handled during the crop year is the only step remaining. Thus the assessment rule complies with another factor with which the Court felt a rule must comply, it provides notice of the procedure to be followed to the affected parties.

Justice Scalia's concurrence also argues for the validity of the assessment rule. In addition to the factors above, Justice Scalia discusses the APA and the government's own interpretation of it at length. He notes that under the APA, rules which must be prospective are "primarily concerned with policy considerations" (*G. U. Hosp.*, *supra*, at 477). The policy of assessments is implemented by 7 C.F.R. § 981.81 and is prospective, although, via the annual budget and assessment rate rule, it has an affect on past transactions, *i.e.*, the almonds handled the first few months of the crop year. Justice Scalia notes that this effect on past transactions is permissible, provided it is not a change in the past law (*G. U. Hosp.*, *supra*, at 477-78).[3]

Another factor that demonstrates that the approval of the budget and the establishment of the assessment rate is not

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[3] It is this effect on past transactions to which respondent was referring on p. 77 of its Brief.

retroactive and, in any event, not prohibited, is the fact of who is affected. It is 7 C.F.R. § 981.81 that obligates handlers to pay an assessment, the subsequent budget and resulting assessment rate is actually to authorize expenditures by the *Board*.

Finally, even if the rule is found to be retroactive, and if the holding in *G. U. Hosp.* is found to apply, the rule is nevertheless permissible as any retroactivity is specifically authorized by the authorizing statute, the AMAA. The AMAA provides that each order "*shall* provide that each handler subject thereto shall pay to [the Board] such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Board], *during any period specified by him* . . . ["] (emphasis added) 7 U.S.C. § 610 (b)(2)(ii). Pursuant to this authority the Secretary, in Order 981, has established the crop year as the specified period. As petitioners themselves note (Tr. 321), the Board and the Secretary must have a reasonable estimate of the crop to permit the procedure to operate. That can not happen until mid-July at the earliest which is *after* the start of the crop year established by the Secretary pursuant to the authority provided to him by the AMAA to specify the applicable period. Thus the Secretary has ruled that assessments shall be on *all almonds* received by a handler during a crop year (7 C.F.R. § 981.81) and the rate must be based on an estimate which can not occur horticulturally until after the crop year has begun and will, by prospective rule 7 C.F.R. § 981.81, apply to all almonds handled during the crop year.

In addition, after considering petitioners' argument as to retroactivity, it is no longer my view that the assessment rate must be included in a *regulation*. In *Wileman I*, quoted above in § V, I adopt the view of the ALJ in that case that, even though the approval of the budget by the Secretary does not have to be accomplished by rulemaking, the levy of an assessment must be done by means of a regulation. However, there is nothing in the Agricultural Marketing Agreement Act of 1937 that requires that a handler's assessment obligations be set forth in a regulation (see 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(i)-(iii)). Since the Order, published in the Federal Register after a formal rulemaking hearing, expressly requires handlers to pay their pro rata share of expenses approved by the Secretary, and expressly authorizes retroactive

assessment determinations (7 C.F.R. §§ 981.80, .81), it is my present view that the Secretary could notify handlers by personal notice or otherwise of their assessment obligations, without issuing a regulation.

If the rules imposing the assessment rates from 1980-81 through 1988-89 were invalid because of retroactivity (which is not the case), this could not be cured by any new rulemaking procedure, but consideration would still have to be given as to whether reimbursement is just and reasonable considering all of the circumstances, whether laches would preclude recovery for some of the years, and whether all handlers should voluntarily be reimbursed by the Secretary (see § V, Additional Conclusions by the Judicial Officer).

VII. There Is No Merit to Petitioners' Appeal.

Petitioners appeal all of the issues decided adversely to them by the ALJ, except the ALJ's rejection of their third argument under the ALJ's § V (holding that § 981.441 of the Order did not have to be promulgated through formal rulemaking rather than informal rulemaking). Petitioners' appeal is, in the main, a rehash of the arguments fully briefed before the ALJ and fully briefed in respondent's responses before the ALJ. In my view, the ALJ correctly decided those issues, and no useful purpose would be served by further discussion here. Briefly, however, it should be noted that petitioners repeatedly argue that when the cooperative bloc-votes against a minority recommendation, the Secretary never gets a chance to consider the minority view. That is not true. Minority views in minutes or elsewhere are transmitted to the Secretary (Tr. 436; see, *e.g.*, RX 87, at 45, reporting the Board's 91 vote, and discussing the dissenting view of the single dissenter (Cloyd Angle, President of Petitioner Cal-Almond, Inc.); PX 62, at 6 (top ¶); PX 63, at 58-60).

For the foregoing reasons, the following order should be issued.

Order

The relief requested by petitioners is denied and the amended petition is dismissed.

APPENDIX K

UNITED STATES DEPARTMENT OF AGRICULTURE

No. 89 AMA Docket No. F&V 981-7

IN RE: CAL-ALMOND, INC.

[Decision and Order Filed Feb. 28, 1991]

By: DONALD A. CAMPBELL, Judicial Officer

This is a proceeding instituted by a petition filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).*

On June 28, 1990, Administrative Law Judge James W. Hunt (ALJ) filed an initial Decision and Order holding against petitioner on all issues except one. As to the issue decided in petitioner's favor, the ALJ held that § 981.441(c)(2) of the Secretary's regulations (7 C.F.R. § 981.441(c)(2)) conflicts with § 8c(10) of the Act (7 U.S.C. § 608c(10)).

On August 16, 1990, petitioner appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been

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* See generally Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

delegated (7 C.F.R. § 2.35),** as to the issues decided adversely to the petitioner. On September 24, 1990, respondent appealed as to the issue decided adversely to the Department. On December 11, 1990, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, I agree with respondent's appeal and find no merit in petitioner's contentions. Accordingly, I am dismissing the petition. I am adopting those portions of the ALJ's initial decision set forth below, with a few trivial changes, and with additions included within brackets, and omissions indicated by dots. Additional conclusions by the Judicial Officer follow the ALJ's initial decision.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This proceeding presents the issue whether the advertising credit provision in the Marketing Order for Almonds Grown in California is in accordance with law.

The proceeding was instituted by a petition filed pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act ("AMAA") of 1937, as amended, 7 U.S.C. § 608c(15)(A). Petitioner is an almond handler.

A hearing was held in Fresno, California, on January 25 and 26, 1990. Petitioner was represented by Brian C. Leighton, Esq. Respondent, the Agricultural Marketing Service, was represented by Carol C. Priest, Esq. Post-hearing briefs were filed by both parties.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Facts

The Marketing Order for Almonds Grown in California ("Order") requires, among other things, that almond handlers pay an annual assessment as part of a program to promote the sale and consumption of almonds. However, a handler, by conforming to certain requirements, can reduce his assessment by having the cost of his direct advertising expenditures credited toward his assessment. Petitioner, an independent California almond handler, brings this action because two applications for advertising credit he submitted in 1989 were denied.

The Almond Order (7 C.F.R. § 981 *et seq.)* was promulgated through formal rulemaking proceedings by the Secretary of Agriculture pursuant to the AMAA (7 U.S.C. § 608c(3)). The purpose of marketing orders is to regulate the handling of various agricultural commodities, including almonds.[1] The AMAA in § 608c(6)(I) states that a marketing order may include provisions relating to product promotion, advertising, assessments, and credits that can be applied toward assessments.

> In the case of the agricultural commodities and the products thereof, other than milk and its products . . . orders issued pursuant to this section shall contain one or more of the following terms and conditions . . .:
>
> (I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: Provided, That with respect to orders applicable to almonds [and 24 other named agricultural commodities] such projects may provide for any form of marketing promotion including paid advertising and with

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[1] The AMAA, a depression-era law, provides for marketing orders on the theory that they will stabilize prices paid to farmers and provide for an orderly marketing system. Agricultural Law § 2.01 *Federal Marketing Order Programs* (1981).

> respect to almonds . . . may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order. . . .

The AMAA further provides in section 608c(10), with respect to advertising, that:

> No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

The AMAA goes on to give the Secretary the authority to establish agencies to assist it in administering marketing orders, which agencies shall have the authority, among other things, to make rules and regulations to effectuate the terms and provisions of an order.

The Almond Order issued by the Secretary provides for the creation of a ten-member Almond Board of California ("Board") composed of industry representatives to assist in administering the Order. The Secretary selects the persons to serve on the Board. A majority vote is required for most Board decisions, but seven affirmative votes are required for a Board decision recommending projects to the Secretary involving marketing, promotions, advertising, assessments, and advertising credits.

The Order states in § 981.41 that the purpose of such projects is to "assist, improve, or promote the marketing, distribution, consumption, or efficient production of almonds." The Order outlines the procedure the Board, with the Secretary's approval, is to follow when engaging in such activities and in section 981.41(e) further provides that:

> Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the

> Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

The Secretary has adopted such rules and regulations in 7 C.F.R. § 981.401 *et seq.*[2] Section 981.441(c) (2) of these regulations (the section principally under challenge in this proceeding) provides that:

> The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

The Almond Board has created a Public Relations and Advertising Committee ("Committee") to promote almonds. The Committee makes annual recommendations to the Board concerning promotional activities, its budget, and the assessments to be levied on handlers. The Board then makes its recommendations on these matters to the Secretary. Money paid to the Board by handlers in lieu of receiving credit for their advertisements is used by the Board to defray its costs for the coming year. The committee does promotional work but engages in no advertising.

When a handler wants credit to be applied toward his assessment for the advertising he conducts, he submits an application, together with supporting documentation, to the Board. The Board's staff reviews the application and makes an initial determination whether the handler should receive credit.

Peggy Leong, the staff manager, testified that one of the first things the staff checks is whether the advertisement meets the requirement of § 981.441(c) (2), that is, whether the clear and evident purpose of the advertisement is to promote the sale, consumption, or use of almonds and whether anything in the advertisement detracts from that purpose.

Leong said that most advertising is approved, but that if the staff recommends disapproval the handler may appeal to the Committee and then to the Board. A USDA representative attends

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[2] These regulations were adopted through informal rulemaking procedures. The AMAA in § 608c(3) only requires that the Order itself be adopted through formal rulemaking proceedings.

Board meetings, but does not participate in or vote on decisions concerning credit applications. However, Martin Engler, an employee of USDA's Agricultural Marketing Service, who attends Board meetings, testified that a handler can ask the Secretary (i.e., Agricultural Marketing Service) to review decisions by the Board concerning advertising credits. This review procedure, however, has not been incorporated into the Secretary's regulations. In the instant case, two applications for advertising credit submitted by petitioner in 1989 were denied credit by the staff and Board (petitioner's exhibits A and B).

Leong testified that the first of these two advertisements, which ran in a local newspaper, was self-promotional and directed at growers rather than at consumers, while the second advertisement, which was to run in the *Wall Street Journal*, included petitioner's comments about his objections to provisions in the Order on assessments and almond reserves. Leong said that the effect of these comments was "to carry [petitioner's] fight against the marketing Order to the public." (Tr. 86.)[3]

Therefore, Leong said, the two advertisements — being directed at growers rather than consumers and containing attacks on the Order — were not creditable because they did not meet the requirements of § 918.441(c)(2) of the Secretary's regulations, that is, the clear and evident purpose of the advertisements was not to promote the sale, use or consumption of almonds and that material in the advertisements also detracted from this purpose.

Petitioner has not filed an appeal of the Board's decision to the Secretary.

Argument

Petitioner, who has the burden of proving that the challenged provision in the Order is not "in accordance with law," contends

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[3] In his brief (p. 39), petitioner states that he "vehemently disagrees with the advertising provisions of the Almond Marketing Order and believes that the assessments are a penalty imposed on independent handlers and imposed by the large competitor, Blue Diamond." The assessment rate in 1989 was 2.5 cents a pound. Petitioner estimated that his 1989 assessment would be $332,000.00.

that the provision in the Order and regulations allowing the Board to deny advertising credits to petitioner is unlawful as not in accordance with law on the grounds that:

1. The provision is an unconstitutional delegation of power by the Secretary to the Board.
2. It violates petitioner's right to due process.
3. It violates petitioner's right of free speech.
4. It conflicts with § 608c(10) of the AMAA.

Discussion

1. Unlawful delegation

Petitioner contends that the authority given to the Almond Board to determine whether to allow a handler credit for its advertising expenditures is an unlawful delegation of the Secretary's legislative and judicial authority.

Administrative functions may lawfully be delegated by the Secretary to an industry group like the Almond Board, provided the industry group functions subordinately to the Secretary and follows standards prescribed by the Secretary. *Sequoia Orange Co.*, 45 Agric. Dec. 11, 36-39 (1986).

In attacks on marketing orders for other agricultural commodities it has been found that the orders in those cases adhered to the requirements for lawful delegation of authority, and, therefore, "[c]onstitutional challenges directed against marketing orders because of their administration by self-interested industry members have been specifically denied for the reason that the Secretary has retained ultimate authority." *Sequoia Orange Co.*, 47 Agric. Dec. 2, 184 (1988) *[, aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *appeal docketed,* No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990)].

The record here shows that the Almond Board has followed the standards prescribed by the Secretary in determining whether handler advertisements are creditable and that, as discussed below, the Secretary retains the authority to make the final decision. Accordingly, as the Board functions subordinately to the Secretary,

who retains ultimate authority over matters relating to advertising credits, there has been no unlawful delegation of the Secretary's authority.

2. Due Process

Petitioner contends that he was denied due process because decisions whether to allow him credit for his advertisements are based on the staffs subjective value judgment. He also suggests that the review procedure is unfair because half of the advertising committee members and a majority of the Board members that review the staff's recommendations represent petitioner's major competitor, Blue Diamond, a large cooperative.

The staff's authority in deciding whether advertising is creditable is not unfettered. The staff is required to follow the standards prescribed by the Secretary. In the two instances involved here the applicable standard related to whether the advertisements promoted the sale, use, or consumption of almonds, and whether anything in the advertisements detracted from that purpose.

One of petitioner's advertisements was a self-promotional piece directed at growers, while the other, although promoting almonds, included critical comments concerning petitioner's objection to the marketing order. In these circumstances, it was neither arbitrary, nor capricious, nor an exercise of subjective value judgment, for the staff to determine, based on the Secretary's objective standard, that the advertisements contained material that detracted from promoting the sale, use, or consumption of almonds. Therefore, as the staff's procedure was to follow the Secretary's standards it did not violate petitioner's due process.

With respect to his complaint that his competitor, a large cooperative, sits in judgment of his advertising, petitioner raises a matter that is a potentially troubling problem in any marketing order industry where a dominant cooperative is in the position on the industry board to use its clout to the disadvantage of smaller independents. This power of cooperatives is well recognized by the Secretary. As pointed out in *Sequoia Orange Co.*, AMA No. F&V 908-2 (Aug. 17, 1989) (which quoted extensively from Congressional reports, court decisions, and prior decisions by the

Secretary), [*rev'd*, No. CV-F-89-632-EDP (E.D. Cal. Nov. 28, 1990)], marketing orders are designed to benefit cooperatives and may even have the effect of giving them a monopoly of the market.[4] *Sequoia* also noted that cooperatives are put in a position by marketing orders where their "ulterior motives" may be their own "aggrandizement" and that they may use their power on an industry board to defeat minority views.

The existence and exercise of this power, while lawful, obviously creates a . . . risk that an independent handler like petitioner may not get a fair shake from an industry board whose majority is composed of representatives from a large competitor.

Although there is no evidence in the record that petitioner's competitor used its power on the Board to deny petitioner credit for his advertising, the competitor is nonetheless in a position where it could for its own "aggrandizement" take action under the cloak of authority of the marketing order that would unfairly affect petitioner's interests. There is, therefore, a . . . risk in this procedure that petitioner's due process rights may be jeopardized. However, this procedure is not necessarily invalid if additional procedural due process safeguards are present. *Matthews v. Eldridge,* 424 U.S. 319, 335 (1976).

There are, I find, such additional safeguards present here. First, a representative from the Secretary is present when the Board considers requests for advertising credits. Although the representative's function is somewhat murky, one function he does provide is oversight for the Secretary through the reports he makes to his superiors who, in turn, would presumably correct any misapplication or abuse of the order. *Cf. Chiglades Farm, Ltd. v.* Butz, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

Second, petitioner has the right to appeal the Board's decision to the Secretary who can then make a final decision on the matter.

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[4] Blue Diamond claims that its share of grocery store shelf space for its products is 92 percent (petitioner's exhibit H).

Although petitioner argues that these procedural safeguards are not written or spelled out in the order or regulations, they do in fact exist. Thus, whether in the regulations (as they should be) or not, they constitute safeguards that ensure petitioner's right to due process.[5] Petitioner's due process was therefore not denied.

3. Free Speech

Petitioner contends that the promotional assessment program violates his right of free speech because he must advertise according to the type of advertising his competitors on the Almond Board consider appropriate.

The Board, however, does not decide what types of advertising petitioner can engage in. Petitioner makes that decision, but if he wants to claim credit for his advertisements he must conform to requirements established by the Secretary.

Even so, petitioner does not lose his right of free speech when he seeks credit for his advertising, since advertising is a protected form of "commercial" speech. Commercial speech can be constitutionally restricted by the government . . . when the government shows that it has a substantial interest in doing so and when it uses means that directly advance that interest. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 637 (1985).

The government certainly has a substantial interest in the economics of agricultural products and an ideologically neutral law imposing mandatory assessments on members of a particular agricultural industry to promote the products of that industry, although impacting on an industry member's free speech, does not necessarily violate the free speech rights of that member. *United*

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[5] Contrary to petitioner's argument, his due process is not violated because there is review of his application by the staff and Committee, as well as by the Board. If anything, this procedure provides more protection for petitioner than the Order requires.

States v. Frame, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied* [, 110 S. Ct. 1168], ___ U.S. ___ (1990).[6]

In this cases the Congress has expressly found in the AMAA that a promotional assessment program may be appropriate for the almond industry. In view of this expression of interest by the Congress, I find that the government has indicated that it has a substantial interest in the economic well-being of that industry. (See also *Cal-Almond, Inc., et al.*, 89 AMA No. F&V 981-5, slip op. at 28-29 (March 19, 1990)). Accordingly, as the Almond Order is an ideologically neutral program that serves only to advance the products of the almond industry it does not violate petitioner's right of free speech. [As to the Judicial Officer's views as to the appropriate test for government regulation which impinges on commercial free speech, see *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23, slip op. at 82-83 (Jan. 23, 1991), (attached as an Appendix to this decision), *appeal docketed,* No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991)].

4. Section 981.441(c)(2) of the Secretary's Regulations v. Section 608c(10) of the AMAA

. . . .

Findings of Fact

1. Petitioner Cal-Almond, Inc., is a California corporation whose mailing address is 6049 Leedom Road, Hughson, California 95326.

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[6] Petitioner contends that, unlike *Frame*, his advertisements are entitled to the greater protection afforded noncommercial speech because they contain his ideological and philosophical opposition to assessments. The almond assessment program, however, like the program in *Frame*, is ideologically neutral and serves only to engage in commercial speech on behalf of members of the industry. Petitioner's attempt to insert his personal views in his advertising does not thereby change the commercial character of the advertising, for, as the court noted in *Zauderer* (p. 637, n.7), "advertising which 'links a product to a current public debate' is not thereby entitled to the Constitutional protection afforded noncommercial speech."

2. At all times material herein, petitioner was a handler of almonds in the State of California.

3. A marketing order for California Grown Almonds was promulgated by the Secretary of Agriculture to, in part, promote the sale, use and consumption of almonds.

4. The order provides for a ten-member Almond Board composed of industry representatives to assist the Secretary in administering the Order according to standards prescribed by the Secretary.

5. The Board functions subordinately to the Secretary and the Secretary retains ultimate authority over the administration of the Order.

6. The Secretary has promulgated rules and regulations to implement the order.

7. The Almond Board has created a Public Relations and Advertising Committee to promote the sale, use and consumption of almonds.

8. The Almond Board, pursuant to the Secretary's Order and regulations, has imposed assessments on handlers as part of its program to promote almonds and allows handlers credit toward their assessments for their direct advertising expenditures.

9. Handlers may receive credit only if they comply with the Secretary's regulations concerning their advertising.

10. A Board staff reviews applications for credit and makes recommendations to the Board concerning whether an advertisement is creditable.

11. The Board's decision on whether an advertisement is creditable may be appealed to the Secretary.

12. The Board and its staff follows the Secretary's standards concerning whether an advertisement is creditable.

13. Secretary's standards regulate both the amount of advertising expenditure that may be creditable and the content of the advertisement [that may be creditable].

14. Petitioner submitted two advertisements for credit in 1989.

15. The Board denied petitioner credit for the two advertisements because they did not meet the Secretary's standards regulating the content of the two advertisements.

16. Petitioner did not appeal the Board's decision to the Secretary.

Conclusions of Law

1. The Secretary's Order and regulations do not constitute an unlawful delegation of the Secretary's authority.

2. The Secretary's Order and regulations do not violate petitioner's right of due process or free speech.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Most of the issues presented in this case were decided by the Judicial Officer in *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23 (Jan. 23, 1991), *appeal docketed,* No. CV-F-91-064 REC (E.D. Cal. Feb. 8,1991), which is attached as an Appendix to this decision.

The ALJ's views that § 981.441(c)(2) of the regulations (7 C.F.R. § 981.441(c)(2)) violates 8c(10) of the Act (7 U.S.C. § 608c(10)) is contrary to my views set forth in Saulsbury (slip op. at 12532), which are adopted by reference here.[7]

Since I am dismissing the petition, there is no need to decide whether the ALJ's conclusion, that the case should be remanded to the Secretary (Agricultural Marketing Service) to review the Board's determination as to petitioner's two 1989 advertisements, would have been correct. However, if I were to decide the issue, I would disagree with the ALJ, since it is up to the handler to decide whether to seek review of the Board's determination by the

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[7] The petitioner here is also a petitioner in *Saulsbury*, but it makes no difference in this case whether *res judicata* or *stare decisis* is applicable.

Secretary. In any event, the issue would now be moot inasmuch as petitioner later sought review by the Secretary, and the Secretary affirmed the Board's decision.

For the foregoing reasons, the following order should be issued.

Order

The relief requested by petitioner is denied and the petition is dismissed.

APPENDIX

In re Saulsbury Orchards & Almond Processing, Inc., 50 Agric. Dec. 23 (Jan. 23, 1991), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991).

[Not published herein.-Editor]

APPENDIX L

UNITED STATES
DEPARTMENT OF AGRICULTURE

Nos. 89 AMA Docket No. F&V 981-5 and
89 AMA Docket No. F&V 981-6

IN RE: CAL-ALMOND, INC. AND GOURMET PACKING CO., INC.

and

IN RE: GOLD HILLS NUT CO., INC.

[Decision and Order filed March 8,1991]

By: DONALD A. CAMPBELL, Judicial Officer

This is a proceeding instituted by petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Order Regulating the Handling of Almonds Grown in California (7 C.F.R. Part 981).*

On March 19, 1990, Chief Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order holding against petitioners on all issues except two. As to the issues decided in petitioners' favor, the ALJ held that the 1988-89 rules requiring petitioners to hold almonds in reserve and to pay administrative assessments were invalid retroactive rules.

On April 20, 1990, petitioners appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7

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* See *generally* Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.015, 2.46-.58 (1981 and 1989 Cum. Supp.).

C.F.R. § 2.35),** as to the issues decided adversely to the petitioners. On April 25, 1990, respondent appealed as to the two issues decided adversely to the Department. On December 21, 1990, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, I agree with respondent's appeal and find no merit in petitioners' contentions. Accordingly, I am dismissing the petitions. I am adopting those portions of the ALJ's initial decision set forth below, with a few trivial changes, and with additions included within brackets, and omissions indicated by dots. Additional conclusions by the Judicial Officer follow the ALJ's initial decision.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

These are consolidated proceedings concerning common issues of law and fact, initiated by petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) (the Act). The petitions challenge the lawfulness of obligations imposed upon the Petitioners as handlers of almonds grown in California under Marketing Order 981 (7 C.F.R. Part 981) (the Order).

An oral hearing was scheduled to begin on June 6, 1989, but was canceled at the suggestion of the parties, who have addressed the issues through the filing of documents and briefs. On May 8, 1989, Blue Diamond Growers, Inc., moved to intervene. In accordance with 7 C.F.R. § 900.57, Blue Diamond was denied the status of an Intervenor but was permitted to file briefs. On August 17, 1989, Petitioners filed a Joint Opening Brief in which they

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** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

withdrew a number of issues raised in the petitions and refined the issues to be resolved.

Petitioners' Joint Opening Brief, at 2-4, specifies fifteen issues for adjudication. In essence, they question (a) whether the Secretary's rulemaking action requiring handlers to withhold in reserve 25% of almonds handled during the 1988-89 crop year was in accordance with law; (b) whether interpretations by the Almond Board and the Agricultural Marketing Service (AMS) respecting the actions handlers need to take to comply with the reserve requirements were valid under the Act or the Order; (c) whether the Secretary's rulemaking action which imposed assessments on all almonds handled during the 1988-89 crop year to pay the Almond Board's expenses and the cost of almond advertising and promotion was in accordance with law; and (d) whether the Almond Board's act of placing a newspaper advertisement informing growers of possible obligations under the marketing order was in accordance with law.

Briefing was completed on December 5, 1989. The parties and Blue Diamond Growers, Inc., have submitted proposed findings of fact, proposed conclusions of law, and briefs. The parties have also filed numerous exhibits and written statements in response to questions I posed to them regarding the way in which the marketing order operated in practice.

On January 2, 1990, Petitioners filed a request for an evidentiary hearing to present evidence in response to Respondent's and Intervenor's answers to the questions I had posed. Petitioners' request expressed concern that the purpose of the questions was "to determine the economic impact upon the Petitioners in order to make a finding as to whether or not Petitioners' injury is *de minimis* and what the impact of a reserve has upon the Petitioners." This interpretation is incorrect. I posed the questions to obtain a better understanding of how the Order actually operates and to compare my tentative interpretations of pertinent Order provisions with those of counsel. Although Petitioners must demonstrate themselves to be aggrieved handlers to meet jurisdictional requirements, the exact magnitude of any dollar damages they may have experienced as the result of actions taken under the marketing order is not a relevant issue in this proceeding and, accordingly,

has not been considered. Of the many factual assertions contained in the responses, I have included as findings of fact only that Petitioners sell most of their almonds into the export market and that they desired to store 1988-89 reserve almonds at their leased warehousing facilities in West Germany. Because these assertions are undisputed and are the only factual components of the responses that I have considered to be relevant and helpful evidence, there is no need for a hearing. Accordingly, Petitioners' motion for an evidentiary hearing and a status conference is denied, and their motion to disregard Respondent's and Intervenor's factual assertions, other than as I have specified, is granted.

All materials filed by the parties and Intervenor have been reviewed. To the extent indicated below, the proposed findings, conclusions, and arguments have been adopted. All other findings, conclusions, and arguments have been rejected as irrelevant, immaterial, or lacking legal or factual basis.

Background

The California almond industry is regulated by Marketing Order No. 981, 7 C.F.R. Part 981, promulgated pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* The Order establishes a regulatory scheme which is applicable to "handlers." Under the Order, a "handler" is one who "handles" almonds. Handling is defined in 7 C.F.R. § 981.16:

> "To handle" means to use almonds commercially of own production or to sell, consign, transport, ship (except as a common carrier of almonds owned by another person) or in any other way to put into the channels of trade, either within the area of production or from such area to points outside thereof, or to receive as the first receiver thereof at any point of entry in the United States and Puerto Rico, almonds which have been exported therefrom and are submitted for reentry or are reentered free of duty: *Provided*, That sales or deliveries by growers to handlers within the area of production shall not be considered as handling.

The Order is administered by the Almond Board of California (the Board), which is an elective body composed of industry

representatives. *See* 7 C.F.R. §§ 981.30-.40. The duties of the Board include acting as intermediary between the Secretary and industry members; investigating and collecting data on growing, shipping, and marketing conditions with respect to almonds; furnishing pertinent information to the Secretary; and keeping records of its acts and transactions. 7 C.F.R. § 981.39.

The Board is authorized:

> to incur such expenses as the Secretary may find are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the Board, including the accumulation and maintenance of an operating reserve fund, and for such purposes as the Secretary may, pursuant to the provisions of this subpart, determine to be appropriate.

7 C.F.R. § 981.80.

The Board is required to submit its recommended budget to the Secretary on or before August 1 of each crop year. Funds to cover the Board's expenses are generated by levying assessments on each handler, in proportion to the kernel weight of almonds handled. 7 C.F.R. § 981.81. In practice, the assessment rate per pound is determined through dividing the total of anticipated Board expenditures by the anticipated total kernel weight of assessable almonds handled by the industry. *See, e.g.*, 53 Fed. Reg. 43850 (October 31, 1988).

The Almond Board budget at issue in this proceeding included funds for advertising and promotion projects authorized under 7 C.F.R. § 981.41(a). That section states in part that:

> [t]he Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving . . . marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized.

Under the provision, handlers are given the choice of remitting to the Board the full amount of their pro rata expense assessment or applying for credit against their obligation in the amount of the difference between the creditable portion of their obligation and their direct expenditures for advertising. 7 C.F.R. §§ 981.41(c) and (d) and 981.441 set forth application procedures, limits on the amount of credit and restrictions on the type of advertising for which credit may be claimed.

The almond marketing order also provides that the Secretary shall impose restrictions on the quantity of almonds which may be handled in any crop year by his designation of the percentages of almonds which shall be salable almonds and reserve almonds whenever he finds that such action would tend to effectuate the declared policy of the Act. These findings may be based upon "recommendations and supporting information supplied by the Board or . . . any other available information." 7 C.F.R. § 981.47. In establishing such salable and reserve percentages for a crop year, the Order provision has the Secretary consider the ratio of estimated trade demand to the estimated production of marketable almonds, or the allocation quantity of almonds, whichever is applicable. In years of estimated oversupply, restrictions on the quantity of almonds available in the marketplace have generally been imposed to maintain adequate returns to growers. In the event of a small crop the following year, reserves are available to meet the trade demand and stabilize prices.

When a reserve percentage is in force, a handler must withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the weight of all almonds received by that handler for his own account during that crop year. This quantity is referred to as the handler's reserve obligation. 7 C.F.R. § 981.50. A handler satisfies his reserve obligation by holding in his possession or under his control, in proper storage, the prescribed quantity of almonds. The reserve quantity must be maintained by the handler at all times while the reserve percentage is in effect. 7 C.F.R. § 981.52. Alternatively, handlers may deliver their reserve quantities to the Board. 7 C.F.R. § 981.51. However, this option is rarely exercised.

Section 981.70 of the Order provides for the monitoring of compliance with the reserve rules and other requirements imposed under the Order. That section states in part that "[e]ach handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of . . . records and for inspection and observation of almonds."

The Order also contains provisions for handler assessments.

Findings of Fact

1. Petitioners, Cal-Almond, Inc., and Gourmet Packing Co., are California corporations. Their common mailing address is 6049 Leedom Road, Hughson, California 95326.

2. Petitioner Gold Hills Nut Co., is a California corporation. Its mailing address is P.O. Box 482, Snelling, California 95369.

3. At all times material herein, Petitioners were handlers of almonds in the State of California.

4. Petitioners sell the vast majority of their almonds into the export ingredient market. Their whole almonds are not sold in stores in the United States or elsewhere under particular brand names. Petitioners sell relatively small quantities of whole almonds to consumers in the United States by mail.

5. On July 20,1988, the Almond Board of California (the Board) voted to recommend to the Secretary of Agriculture that a reserve of 25% be established for the 1988-89 crop year.

6. Subsequent to the July 20, 1988, meeting, the Board published several informational notices. A photocopy of one such notice, which would appear to be a newspaper advertisement, is in evidence as RX 19. The text states that growers who sell their crops to anyone other than a handler registered with the Almond Board of California are responsible for obligations under the almond marketing order, which include holding 25% of marketable tonnage in an unallocated reserve and an assessment of 2.65 cents per pound. The notice further states:

> Failure to meet these requirements is a violation of Federal law. Willful and deliberate violations carry penalties of a maximum of $5,000 per violation. Actions

are brought in Federal District Court by the Department of Justice. For further information, call or write Almond Board of California, P.O. Box 15920, Sacramento, California 95852 (916) 929-6506.

7. On September 16, 1988, AMS published in the *Federal Register* a proposed rule that would establish salable, reserve, and export percentages of 75%, 25%, and 0%, respectively, for almonds received by handlers during the 1988-89 crop year. 53 Fed. Reg. 36051 (September 16, 1988). The proposal stated generally that the rule is intended to prevent unreasonable fluctuations in shipments and prices in view of the very large anticipated supplies of almonds, both in California and the rest of the world.

8. The proposal further stated that, while the rule might restrict the quantity of almonds which handlers would sell in normal domestic and export markets, the proposed salable and reserve percentages were found necessary to lessen the impact on prices of the oversupply of almonds that year, to promote stronger marketing conditions, to avoid unreasonable fluctuations in prices and supplies, and to improve returns to growers. Reserve almonds could be released for sale at a later date if the salable percentage was discovered to be insufficient to satisfy the 1988-89 trade demand. This demand would include the desirable carryover requirements for the 1989-90 season. The 25% reserve percentage was proposed to enhance market stability during the 1989-90 crop year in the event that 1989 production would be insufficient to meet the trade demand. The proposal stated that if the reserve was not later released or carried over, the reserve almonds could be diverted to secondary outlets. 53 Fed. Reg. 36052 (September 16, 1988).

9. This proposed rule for salable and reserve percentages was based upon a recommendation of the Board and upon other available information. 53 Fed. Reg. 36052 (September 16, 1988).

10. The Board based its recommendation for the reserve and salable percentages on estimates of marketable supply and combined domestic and export trade demand for the 1988-89 crop year. The Board estimated that supply for the 1988 season would be 556.8 million kernel weight pounds. This amount was based upon the

Board's 1988 crop estimate of 580 million kernel weight pounds, minus an estimated 23.2 million kernel weight pounds lost through manufacturing and the removal of inedible kernels. 53 Fed. Reg. 36052 (September 16,1988); PX 25,31.

11. Trade demand was calculated to be approximately 530 million kernel weight pounds. This amount included 160 million kernel weight pounds for domestic needs and 370 million kernel weight pounds for export needs. An inventory adjustment was made to account for salable almonds carried in from the 1987- 88 crop year; for the 1987-88 crop year reserve released on August 1, 1988; and for supplies of salable almonds deemed desirable to be carried out on June 30, 1989, for early shipment during the 1989-90 crop year until the 1989 crop is available for market. With these adjustments, the trade demand was estimated to be 417.6 million kernel weight pounds. The proposed rule included a tabular presentation of the estimates and calculations upon which the Board's recommendation to the Secretary was based. 53 Fed. Reg. 36052 (September 16, 1988); PX 25.

12. The AMS found that 75% of the almond crop would satisfy trade demand. The other 25% of the total was to be withheld by handlers to satisfy the reserve obligation. 53 Fed. Reg. 36052 (September 16,1988); PX 25.

13. The AMS announced that interested persons would be allowed 15 days in which to comment on the proposed rule. The AMS stated its finding that a comment period of 15 days was adequate given that the crop year to which the proposed reserve rule would apply began July 1, 1988. The AMS further stated that since late summer and early fall are usually active times for almond sales, handlers and buyers should know as soon as possible the extent to which volume regulation would be in effect for the crop year. 53 Fed. Reg. 36053 (September 16, 1988); PX 25.

14. The proposed rule was reviewed by the Secretary under Executive Order No. 12,291 and Departmental Regulation 1512-1 and was determined to be a "non-major" rule. 53 Fed. Reg. 36051 (September 16, 1988); PX 25.

15. During the 15-day comment period, 11 comments on the proposed rule were received. The commenters were Steven W.

Easter of Blue Diamond Growers; Budge Brown of Brown Enterprises; Frank S. Swain, Chief Counsel for Advocacy of the Small Business Administration; Lars E. Johnson of L.E. Johnson Almonds Orchards; Gary Powell of Quality Nut Co.; Cloyd Angle of Cal-Almond, Inc.; Robert G. den Dulk; James G. Crecelius of Monte Vista Farming Co.; Brian Leighton, counsel to the Independent Almond Handlers Association; Daniel L. Mallory of Roberts Ferry Nut Co.; and Les Portello of Portello Ranch. 54 Fed. Reg. 3585 (January 25, 1989); PX 26, 27, 28.

16. Blue Diamond Growers expressed support for the proposed rule. The other 10 commenters opposed a 25% reserve for the 1989-90 crop year. PX 26, 27, 28.

17. The AMS published the final rule, including its responses to comments, in the *Federal Register* on January 25, 1989. 54 Fed. Reg. 3584 (January 25, 1989); PX 26.

Because many of the objections to the proposed reserve rule appeared in more than one commenter's remarks, the AMS found it impractical and duplicative to address the submissions seriatim. Therefore, the responses generally address objections without reference to the parties raising them.

18. Several commenters asserted that a 25% reserve is larger than required. Some stated that no reserve should be imposed, whereas others suggested a 10 to 15% reserve for the year. The arguments advanced for no reserve or a smaller reserve included (a) that making all almonds available for sale might expand almond markets; (b) that the crop yield estimate on which the recommended reserve percentage is based may be significantly higher than the actual yield; (c) that, in the event of a large crop the following year, the 25% reserve might result in an excessive carryover of inventories; and (d) that, in the event of a large crop the following year, disposition of 1988-89 reserve almonds into noncompetitive outlets would result in low returns on 25% of the year's crop.

In response, the AMS stated that many of these concerns were raised and discussed at the July 20, 1988, meeting of the Board. The AMS further stated that a reserve percentage that is based upon an inaccurate initial estimate of crop yield can be revised by the Board:

> [T]he Board monitors ongoing developments in the industry, including such factors as whether the total almond production in the current crop year will fall short of early season estimates. The Board has the responsibility to recommend an increase in the salable percentage later in the season if it appears that supplies made available by the initial free percentage will be insufficient to meet trade demand needs. The next NASS [National Agricultural Statistics Service] estimate will be available early in 1989. However, the Board need not wait until the early 1989 estimate, but may recommend revising the salable and reserve percentages at any time until May 15 of each year, if other information available to the Board indicates such revision is necessary to provide sufficient supplies to meet trade demand.

54 Fed. Reg. 3586 (January 25,1989).

19. A number of commenters questioned the benefits of a 25% reserve. Some argued that because early season demand for almonds was high, a reserve was unnecessary and would "reduce sales at the start of the season." 54 Fed. Reg. 3586 (January 25, 1989).

In its response, the AMS appears to have adopted the reasoning of Blue Diamond, as expressed by Mr. Easter:

> Steven W. Easter of Blue Diamond, however, in his comment in support of the proposed salable and reserve percentages, wrote that if the almond industry were to release all of the available almond tonnage to the market immediately without the use of the reserve, the impact on growers' returns would be "disastrous." Use of zero percent reserve at the opening of the crop year would be very detrimental to almond prices, Mr. Easter wrote. In his opinion, if there were no reserve, monetary returns to growers might not even cover the costs of almond production. He added that he also believes that all of the available almonds could not be absorbed by the market this year, and that if all available almonds were marketed, speculative buying of almonds would occur at very low prices in an unstable market. Mr. Easter added that since 1970, at least one year in three has yielded a small almond crop with consequent shortages in the marketplace. The use of the

> reserve in this year of excess supply, this commenter stated, would also provide a buffer in the event of a short crop and an undersupplied market next year, which is a statistical possibility, and would provide market stability.

54 Fed. Reg. 3586 (January 25, 1989).

20. Some commenters asserted that the proposed reserve would be detrimental to small handlers. These comments generally advanced the argument that reserves place a disproportionate burden upon small handlers and that small handlers realize maximum net gain if permitted to sell all of their almonds in the early part of the season. In response, the AMS stated:

> [T]hese comments do not take into account the fact that if there were no volume regulation, not only the commenters' own businesses but most other small almond handlers would be trying to sell their almonds quickly in order to reduce storage or holding costs. Large handlers also would continue to aggressively market their almonds, and the market would be under the pressure of record large supplies, driving down prices received for almonds. Prices likely to be received by handlers under such rapid marketing of their almonds (i.e., without a reserve) would not be the same as prices with a reserve in place. Without a reserve, prices would be expected to be significantly lower in an oversupplied market. The advantage described by a handler if that handler were able to market all its almonds immediately, is valid only theoretically, because in actual practice most handlers would likely follow the same course of action, and thus, no particular handler would be able to market its almonds immediately without stiff competition from the rest of the industry also attempting to do so. While large handlers traditionally market throughout the crop year, it is reasonable to assume that, without regulation, they also would seek to market more of their almonds early in the crop year.

54 Fed. Reg. 3586 (January 25, 1989).

21. Several commenters questioned whether the price-increasing effects of the reserve would be sufficient to compensate

for the reduced volume of almonds available for sale. In response, the AMS stated that:

> these commenters equate the reserve to losing 25 percent of their crop. In actual practice, the 25 percent reserve is not lost to the market. Commonly, a portion of the reserve, and in some cases the entire reserve, is released to be freely salable later in the season, as the 18 percent reserve portion of the crop was released in the 1987-88 crop year. Such releases may occur once a portion of an annual crop has been marketed, and the danger of a seriously oversupplied market early in the marketing season, with consequent price reductions, has passed.
>
> In the event that the reserve is not released, it would be marketed to low-value outlets noncompetitive with normal markets. While reserve almonds would not likely be sold at prices comparable with salable almonds, the improved prices received for the salable portion of the crop and the improved stability of the industry are expected to compensate for this reduction.
>
> . . . The Department anticipates that the Board will review economic conditions as the season progresses and will make recommendations to release reserve almonds as they are needed. Again, if the reserve almonds are eventually disposed of into low-value outlets, the revenue gain on the salable portion of the crop would be maximized as much as possible. This would take place, for example, if the production surplus cannot be absorbed by the market and releasing the reserve would be detrimental to the market.

54 Fed. Reg. 3587 (January 25, 1989).

22. Mr. Leighton's comment, in part, challenged the determination of the AMS, pursuant to Executive Order No. 12,291, that the reserve rule is "non-major." Specifically, Mr. Leighton asserted that the rule is "major" because it would have an annual economic effect of more than $100,000,000. In response, the AMS stated:

> [T]he commenter arrives at this "impact figure" by calculating the total dollar value of the reserve (approximately 139 million

> kernel weight pounds) and equating this figure to lost revenue. In actual practice, the reserve does not equal lost revenue, because such a calculation does not take into account expected improved returns for the 75 percent salable portion of the crop, or the returns received for the 25 percent of the crop which will be sold to low-value outlets or released to the salable category later in the season. In the event that some or all of the reserve is transferred to the salable category later in the season, there would not be a reduction of revenue received for the reserve, but improved returns would be anticipated for both the reserve and the initial salable percentage of 75 percent of the 1988-89 almond crop.

54 Fed. Reg. 3587 (January 25, 1989).

23. Several commenters expressed opinions as to the fairness of the Order and the extent of Blue Diamond's influence upon its operation. In response, the AMS stated:

> Miscellaneous comments were also received concerning the perceived fairness or unfairness of the almond marketing order in general and the makeup of the industry representation on the Board between members representing the cooperative and independents. This final rule only concerns the establishment of salable, reserve and export percentages for almonds. However, marketing agreement and Order No. 981 regulating the handling of almonds grown in California are effective under the Agricultural Marketing Agreement Act of 1937, as amended, and the nomination and selection of the members on the Committee are pursuant to the procedures that appear in the provisions of the order.

54 Fed. Reg. 3587 (January 25, 1989).

24. The final rule established a reserve of 25% of the 1989-90 almond crop. The text of the rule includes a finding that the reserve would tend to effectuate the declared policy of the Act. 54 Fed. Reg. 3584 (January 25, 1989); PX 26.

25. The AMS also considered the economic impact of the reserve percentage on small entities. The agency noted that the majority of handlers in the industry might be classified as small business entities and found that the proposed action would not have

a significant impact on a substantial number of small entities. Specifically, it was found that any costs imposed on the businesses by the rule were expected to be more than offset by the benefits derived from it. 54 Fed. Reg. 3584 (January 25, 1989); 53 Fed. Reg. 36051-52 (September 16, 1988); PX 25, 26.

26. Mr. Frank Swain of the Small Business Administration submitted a comment expressing, in part, the concern that a reserve might result in a loss of market share by small handlers. Mr. Swain specified that this might occur if the reserve interfered with the handlers' performance of contractual obligations. In response, the AMS stated:

> [T]he almond marketing order has been in effect since 1950 and many reserve percentages have been established. Handlers are aware of the marketing order and program operations conducted under the order, and plan their business operations accordingly. Thus, the probability of a large almond crop this year, in addition to the large carryover from the prior season, would be sufficient cause for handlers to anticipate the establishment of a reserve and plan their business operations accordingly....

54 Fed. Reg. 3587 (January 25, 1989).

27. The effective date of the final rule was stated to be 30 days after its publication in the *Federal Regis*ter on January 25, 1989. 54 Fed. Reg. 3584 (January 25, 1989). The rule specifically stated that a delayed effective date was being used to give handlers the opportunity to achieve compliance.

28. On July 31, 1989, a final rule was published in the *Federal Register* reducing to zero the reserve percentage applicable to almonds received during the 1988-89 crop year. 54 Fed. Reg. 31502 (July 31, 1989).

29. The Almond Board has adopted the position that reserve almonds must be stored within the State of California. The Board informed handlers, including Petitioners, of this requirement in a letter dated June 15, 1988. PX F.

30. Petitioner Cal-Almond sells most of its almonds into the export market. It had leased ware-house space in West Germany

and wished to store its 1988-89 reserve almonds there pending release of the reserve. Petitioner refrained from storing reserve almonds in West Germany in compliance with the Board's position.

31. AMS, upon consultation with the Office of the General Counsel, sent a letter to the Board, dated December 14, 1988, in which it stated its position that a contract for the disposition of reserve almonds entered into before the release of the reserve constitutes a sale or consignment and, as such, is an act of handling under the Order, which would be detrimental to the reserve program. RX 18. In deference to this position, Petitioners refrained from entering into contracts for future sale of reserve almonds.

32. On July 21, 1988, the Almond Board met and voted unanimously to recommend to the Secretary an assessment rate of 2.65 cents per pound of assessable almonds, with an allowable advertising credit of 2.5 cents per pound of assessable almonds. This rate was based upon recommended 1988-89 marketing order expenditures of $16,130,309. Assessable almonds include almonds which are required to be withheld in satisfaction of each handler's reserve obligation. PX 31; RX 12.

33. On September 16, 1988, AMS published in the *Federal Register* a proposed rule to establish the assessment rate for the 1988-89 crop year. 53 Fed. Reg. 36053 (September 16,1988); PX 10.

34. The proposal was reviewed under Executive Order No. 12,291 and Departmental Regulation 1512-1 and was determined to be a "non-major" rule. 53 Fed. Reg. 36053 (September 16,1988); PX 10.

35. The AMS considered the economic impact of the proposed assessment on small entities. The agency found that while some additional costs would be imposed by the rule, they would consist of uniform assessments on all handlers. These costs would be offset by the benefits derived from the operation of the marketing order. The agency therefore found that the proposed action would not have a significant economic impact on a substantial number of small entities. 53 Fed. Reg. 36053 (September 16, 1988); PX 10.

36. The AMS considered the budget and the assessment rate recommended by the Board and proposed that these figures be authorized under the Order as recommended. 53 Fed. Reg. 36053 (September 16,1988); PX 10.

37. The agency found that an expedited process of approval for the budget and assessment rate was needed in order that the Board would have adequate funds. It was further noted that the Board's action upon the recommended budget and assessment rate occurred on July 20, 1988, somewhat later than such action is usually taken. Accordingly, the agency determined that a comment period of less than 30 days was appropriate. 53 Fed. Reg. 36054 (September 16, 1988); PX 10.

38. Interested persons were given 10 days in which to comment on the proposed budget and assessment rule. During this period, three comments were received. The commenters were Steven W. Easter of Blue Diamond Growers, Frank S. Swain of the Small Business Administration, and James G. Crecelius of Monte Vista Farming Co. RX 15.

39. Mr. Easter expressed support for the proposed budget and assessment rate. The other commenters opposed the proposal. RX 15.

40. A final rule approving the Board's recommended budget and assessment rates was published in the *Federal Register* on October 31, 1988. The text of the rule included the finding that the rule would tend to effectuate the declared policy of the Act. The concerns expressed by Messrs. Swain and Crecelius were addressed at length. 53 Fed. Reg. 43849-50 (October 31, 1988); PX 11; RX 15.

In response to Mr. Swain's objections to the lack of a regulatory flexibility analysis, the Department stated the reasons for its position that no analysis was required in the circumstances. Mr. Swain's concerns as to the fact that the comment period afforded was only 10 days in length were met by the Department's explanation of the Board's pressing financial requirements.

Mr. Crecelius expressed the opinion that the advertising assessment is unfair and wasteful of growers' money. In response, the Department explained the objectives of the advertising program

and detailed the numerous promotional activities, other than brand advertising, for which handlers may receive credit against assessments.

41. It was found by the agency that good cause existed for not postponing the effective date of the rule until 30 days after publication in the *Federal Register*. This finding was based upon the Board's need for funds to pay its expenses on a continuous basis and the fact that handlers were made aware of the proposed budget and assessment rate at public meetings of the Board.

Conclusions and Discussion

A. **The Secretary's rulemaking action requiring handlers to withhold in reserve 25% of the almonds handled during the 1988-89 crop year was ...[valid].**[1]

. . . .

In addition to the contention that the final rule was retroactive, Petitioners have advanced other arguments for setting aside the rule as invalid.

When the proposed rule was issued, a 15-day comment period was granted. Petitioners state that this was insufficient because a period of 30 days or more is recommended for rulemaking by Departmental Regulation 1512-1 (PX 1). Petitioners urge that the regulation enlarges the requirement imposed upon the Department by the Administrative Procedure Act, 5 U.S.C. § 553(c), that interested persons be given "an opportunity to participate in . . . rulemaking through submission of written data, views or arguments."

Although the Administrative Procedure Act requires that a final rule must ordinarily be published 30 days before its effective date (5 U.S.C. § 553(d)), the statute does not specify how much time must be given for filing comments after the publication of a proposed rule. The Attorney General has interpreted the Administrative Procedure Act only to require "reasonable notice." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL

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[1] [The ALJ's holding, that the Secretary's rulemaking action was not in accordance with law since it was retroactive, is omitted.]

ON THE ADMINISTRATIVE PROCEDURE ACT 28-29 (1947). And courts have held that Agencies should generally be free to "fashion their own rules of procedure and methods of inquiry."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543 (1978), *quoting FCC v. Schreiber*, 381 U.S. 279, 290 (1965). It is within the agency's discretion to determine the procedures necessary to provide a "full and fair opportunity to comment on all significant issues in the rulemaking proceeding." *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986). Agency procedures are to be upheld unless they are arbitrary, capricious, or constitute an abuse of discretion. *Id.*

Departmental Regulation 1512-1, by its terms, imposes no rigid requirement to provide comment periods of 30 days or more. Section 4(d)(1) of the regulation specifically preserves the discretion to provide shorter comment periods when "an emergency or other good reason exists." Moreover, this internal directive was not published in the Federal *Register* and is not intended to have the force and effect of law. The Department's purpose in issuing this regulation appears in Section 1:

> This directive is intended only to improve the internal management of the Department and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department, its agencies, its officers or employees or any other person.

I therefore conclude that section 4(d)(1) of Departmental Regulation 1512-1 does not create any requirement to provide comment periods of 30 days or more. *Cf. Brennan v. Ace Hardware Co.*, 495 F.2d 368, 376 (8th Cir. 1974) (internal handbook for agency personnel does not itself create requirements binding upon agency). Departmental compliance with this guideline, as such, is not reviewable. A decision to provide a comment period of less than 30 days is invalid only if it is arbitrary, capricious, or an abuse of discretion within the meaning of the Administrative Procedure Act. *See Phillips Petroleum* Co., 803 F.2d at 559.

The Department's decision to grant interested parties a period of 15 days in which to comment on the proposed 1988-89 reserve

rule was not arbitrary, capricious, or an abuse of discretion. The Department's stated goal of expediting the promulgation process was reasonable, though somewhat ironic, given the rule's retroactive character.

. . . [T]here is no credible evidence that the use of a 15-day comment period in itself denied Petitioners or others a full and fair opportunity to comment on the issues. Petitioners' counsel, as well as other interested persons, filed extensive comments. Since the proposed percentage was the percentage recommended by the Board, Petitioners had ample opportunity even prior to the Department's call for comments to formulate their objections. I therefore conclude that the 15-day comment period in no way prevented Petitioners from fully formulating and presenting their views to the Department.

Petitioners also argue that the procedures which the Department employed in promulgating the reserve rule failed to comply with Departmental Regulation 1512-1 and Executive Order No. 12,291, 3 C.F.R. 127 (1981 Comp.), *reprinted in* 5 U.S.C. § 601 at 473 (1988). Specifically, Petitioners challenge the determination that the rule was not "major" within the meaning of the Departmental Regulation and section 1(b) of the Executive Order.

Petitioners' challenge is based on the incorrect assumption that the Department's compliance with Executive Order No. 12,291 is reviewable, *as such*. Section 9 of the Executive Order states:

> *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

3 C.F.R. 133-134 (1981 Comp.). This language evinces the "clear and unequivocal intent that agency compliance with Executive Order No. 12,291 not be subject to judicial review." *State of Mich. v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986). *Cf. In re Surface*

Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980) (analogous holding with respect to Executive Order providing for inflationary impact statements).

The holding of *State of Mich. v. Thomas* applies with equal force to Departmental Regulation 1512-1. The intent of the Executive Order is not erased when its provisions are merely restated in intra-agency guidelines such as those contained in the Departmental Regulation. This purely internal restatement confers no private right of action. *See Brennan v. Ace Hardware Co.*, 495 F.2d at 376. Accordingly, I conclude that the Department's compliance, as such, with Executive Order No. 12,291 and Departmental Regulation 1512-1, in connection with the promulgation of the 1988-89 reserve rule is not *per se* judicially reviewable and, by inference, not reviewable in this adjudicative proceeding. *See, e.g., County Line Cheese Co. and Meadow Gold Dairy*, 44 Agric. Dec. 63 (1985) (on the distinction between the Secretary's legislative and adjudicative capacities).

The Executive Order's provisions respecting judicial review are similar to those found in the Regulatory Flexibility Act, 5 U.S.C. § 611, which provide that "any analysis that is undertaken shall be part of the whole record of agency action." Justice Scalia, while a member of the United States Court of Appeals for the District of Columbia Circuit, interpreted this language to mean that although agency compliance is not reviewable, *as such,* the rule itself will be set aside "if data in the regulatory flexibility analysis — or data anywhere else in the rulemaking record — demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious." *Thompson v. Clark*, 741 F.2d. 401, 405 (D.C. Cir. 1984). My review of the whole record leads me to conclude that the Department's assessment of the effects of the reserve rule on industry members meets the "general legal requirement of reasoned, nonarbitrary decisionmaking." *Thompson v. Clark*, 741 F.2d at 405. As demonstrated by the statements contained in the final rule (findings 20-22, in particular), the Department fulfilled the requirements of the APA and addressed in a rational manner Petitioners' stated concerns.

Finally, Petitioners challenge the 1988-89 reserve rule as a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution. They argue that the rule so restricts their use of property that it effects a regulatory taking requiring compensation. Petitioners' argument is rejected.

It is well established that regulation pursuant to the Agricultural Marketing Agreement Act of the volume of an agricultural commodity moving in interstate commerce does not, as a general matter, constitute an unconstitutional deprivation of property. *See, e.g., United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 568-81 (1938); *United States v. Mills*, 315 F.2d 828, 838 (4th Cir. 1963). And courts have specifically held that marketing order provisions fixing prices and restricting the sale of reserves do not constitute takings without just compensation. *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (1938); *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785 (1975). In both of the latter cited cases, it was held that the regulatory program in question provided at least some compensation to the affected parties. The *Prune* court further noted that the amount of compensation is a policy decision made, at least initially, by a committee elected to represent the interests of the entire industry. *Prune Bargaining Ass'n*, 444 F. Supp. at 793.

The cited holdings rest in part upon the view that the just compensation clause is applicable only to a "direct appropriation of property." *See, e.g., Wallace*, 98 F.2d at 989. However, the Supreme Court has more recently held that a governmental action "short of acquisition of title or occupancy" can amount to a taking "if its effects are so complete as to deprive the owner of most of his interest in the subject matter." *Ruckelshaus v. Monsanto* Co., 467 U.S. 986, 1005 (1984), *quoting United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).[2] "Property," as used in the Takings Clause, refers to "the group of rights inhering in the

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[2] *See also* Executive Order No,. 12,630, 3 C.F.R. 554 (1988 Comp.), *reprinted in* 5 U.S.C. § 601 at 479 (1988) (providing guidance to Agencies on the implications of the more recent Supreme Court decisions for regulatory programs which affect property rights).

citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors,* 323 U.S. at 377-378. It is therefore clear that restrictions on disposition can constitute takings in some circumstances.

"The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry." There is no "set formula" which directs this enterprise. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). However, the Supreme Court has identified several factors which should be considered in determining when regulatory action constitutes a taking. These are "the character of the governmental action, its economic impact, and its interference with reasonable, investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1005.

The governmental action here is a restriction on the disposition of almonds imposed with the objective, *inter alia*, of stabilizing prices and supplies. It is a valid exercise of the commerce power to control the flow of commodities in interstate commerce and is intended to further a legitimate governmental objective. *See United States v. Rock Royal Co-op., Inc.*, 307 U.S. at 572. The obligation to withhold reserves is imposed equitably upon all handlers. Its imposition is supported in part by the finding that the benefits to handlers in combating the price-depressing effects of excess supply outweigh any costs of maintaining the reserve. Finally, the action taken is the result of close cooperation and negotiation between the Secretary and a representative industry body. Therefore, it would appear that the reserve withholding requirement is most accurately viewed not as an uncompensated taking, but as a required contribution to a well established, industry-conceived program of economic self-help.

The characterization of governmental action here necessarily includes the issue of economic impact, because reserves are designed to generate certain economic effects. However, the nature and compensatory adequacy of these effects are questions of economic theory and policy. Although the reserve requirements at issue in this case may well have benefited some members of the industry more than others, it is established beyond question that such differential effects are permissible under the Act. The mere existence of these effects does not, of itself, render a given

marketing order unconstitutional. *See United States v. Mills*, 315 F.2d at 828. *See also Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). To the extent not specified in the Agricultural Marketing Agreement Act, the selection of the means to implement the statute's policy objectives is "peculiarly a matter of administrative competence." *Sequoia Orange Co., et al.*, 47 Agric. Dec. [2], 87 [(1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *appeal docketed*, No. 90.15505 (9th Cir. April 24, 1990), No. 9015781 (9th Cir. June 11, 1990)]. Therefore, the policy decisions underlying reserve rules may properly be challenged only by appeals to the Secretary in his legislative capacity or in the Halls of Congress.

The "weighing of public and private interest" required in just compensation clause analysis, *Agins v. Tiburon*, 447 U.S. 255, 262 (1980), was expressed by Congress in its enactment of the statute authorizing marketing orders. That weighing, delegated to the Secretary, was continued in the promulgation of the Order and subsequent regulations. The evidence in this case indicates that the Department considered the impact of the 1988-89 reserve rule on handlers and concluded that the benefits to the industry (higher prices and improved stability of the market) would compensate for the costs of maintaining the reserve. *See* 54 Fed. Reg. 3587 (January 25, 1989). Only Congress or the Secretary acting in his legislative capacity may now overrule these findings and decisions.

The final question to be addressed is the extent to which the reserve rule interfered with Petitioners' reasonable investment-backed expectations. As in *Monsanto*, 467 U.S. at 1005, this factor overwhelms the others and is, by itself, dispositive of the constitutional issue. . . . Petitioners did have notice that *some* reserve requirements would probably be established. Given Petitioners' awareness that some reserve was likely in 1988-89, as well as their general awareness of the history of reserves under the Order, Petitioners did not have a reasonable basis for investment-backed plans or commitments to market all almonds received in 1988-89. The timing of the reserve rule in this case failed to allow Petitioners to plan operations for the year with perfect certainty of their reserve obligations. However, in the context of this marketing order, mere lack of certainty as to the precise

requirements of the final reserve rule is not a reasonable foundation for concrete marketing plans. Therefore, even if Petitioners had demonstrated the existence of investment-backed expectations of marketing more than 75% of their 1988-89 almonds, the expectations would not have been reasonable.

In sum, upon consideration of the character of the 1988-89 reserve rule, its economic impact and, specifically, the extent to which it interfered with Petitioners' reasonable investment-backed expectations, I conclude that it is not the type of governmental action that is proscribed by the just compensation clause as an unconstitutional interference with property interests.

B. The interpretations by the Almond Board and AMS respecting the actions handlers needed to take to comply with the reserve requirements were valid under the Act and Marketing Order 981.

In a letter to the Board, dated December 14, 1988, AMS stated its position that a contract for the disposition of reserve almonds entered into before the release of the reserve constitutes a sale or consignment and is therefore an act of handling within the meaning of the relevant provisions of the Order. The agency further stated that it considered such transactions to be price-depressing and detrimental to the reserve program. Petitioners maintain that they refrained from entering into contracts for the sale of reserves in deference to the agency's view. Petitioners argue that neither the AMS position, nor the consequent obligation imposed on them to eschew this type of transaction, was in accordance with law.

Petitioners' arguments are unpersuasive. It is well established that an agency's interpretation of its own regulations is entitled to great weight. *County Line Cheese Co. and Meadow Gold Dairy*, 44 Agric. Dec. 63, 87 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987).

Deference to agency expertise is especially appropriate when the regulations in question are components of intricate, highly technical regulatory programs, such as marketing orders. *See, e.g., Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966); *Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 59-60 (1986) (citing numerous cases in support). Agency interpretations of regulations

implementing this type of program are to be upheld on review if they are reasonable. *County Line Cheese Co.*, 41 Agric. Dec. 640, 643-644 (1982). The AMS position on contracts for the future sale of reserve almonds meets this standard.

The formation of a contract for the future sale of almonds is reasonably viewed as placing those almonds into the channels of trade. The term "sale" can reasonably be read as including future sale. Moreover, commitments for future sales of storable agricultural commodities, such as almonds, are known to have substantial intertemporal effects on prices. *See, e.g.*, Peck, *Futures Markets and Intertemporal Commodity Pricing*, in ECONOMIC EFFICIENCY IN AGRICULTURAL AND FOOD MARKETING 256 (R. Kilmer and W. Armbruster eds. 1987). The existence of these economic effects strongly supports the conclusion that contracts for future sales place reserve almonds into the channels of trade.

Agency action is "presumed to be based on facts justifying the specific exercise of . . . delegated authority." *Sequoia Orange Co., et al.*, [*supra*,] 47 Agric. Dec. [at] 87, *citing United States v. Rock Royal Co-op., Inc.*, 307 U.S. at 567-568. Petitioners have not presented any evidence sufficient to overcome this presumption favoring the Agency's position on contracts for future sales of reserve almonds. Therefore, the Department's position should stand.

Petitioners also challenge the Board's position that reserve almonds must be stored within the State of California. Petitioners maintain that the Board lacks the authority to impose this requirement.

Petitioners' argument is belied by the language of the Order and the realities of administration. Section 981.38 grants the Board the power to investigate violations of the Order and to administer the Order according to its terms. Section 981.70 of the Order provides that each handler's premises shall be accessible to the Board for the examination of almonds. Given the authority granted by these sections, it is proper for the Board to impose ancillary requirements which reasonably control the geographic scope of its oversight activities.

Petitioners have stated that the Board's requirement frustrated their plans to store reserve almonds in West Germany. The monitoring of almonds stored in a distant foreign country would constitute an unjustifiable burden on the Board. Furthermore, the shipment of reserve almonds to West Germany, even if done, as Petitioners urge, to save delivery time in the event that the reserve is released, may reasonably be viewed as an act of selling or consigning. At the very least, such conduct strongly suggests the presence of an underlying sale or consignment contingent upon the release of the reserve. And, as discussed above, entry into arrangements of this type constitutes an act of handling. It would be unreasonable to assume that Petitioners would incur the expenses of leasing warehousing facilities in West Germany, shipping almonds there, and maintaining them in good condition, if those almonds were not, in fact, committed for sale. In sum, given Petitioners' intention to store reserve almonds in West Germany, I conclude that the Board acted reasonably and within the boundaries of its authority in requiring that reserve almonds be stored within the State of California.

C. The Secretary's rulemaking action setting handler assessments for the 1988-89 crop year was ... [valid].

Petitioners maintain that the 1988-89 assessment rule is not in accordance with law because (1) it is retroactive, (2) the 10-day comment period used was violative of Departmental Regulation 1512-1 and the Administrative Procedure Act, (3) it became effective on the date of its publication in the *Federal Register* and was therefore violative of the Administrative Procedure Act requirement that its effective date be delayed for 30 days or more after publication, (4) assessments on reserve almonds are unauthorized under the Order, (5) creditable advertising assessments based in part upon reserve tonnage are arbitrary because they force handlers to advertise almonds which may not be sold, and (6) the Department failed to provide a proper statement of the purpose of the rule.

. . . .[3]

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[3] [The ALJ's holding, that the Secretary's action was not in accordance with law since it was retroactive, is omitted.]

Petitioners also challenge the Department's decisions to use a 10-day comment period and to dispense with the requirement of 5 U.S.C. § 553(d) that a rule take effect no sooner than 30 days after its publication in the *Federal Register*....

However, considered in isolation from the retroactive character of the assessment rule, the Department's choice of comment procedure and effective date is amply supported by the stated rationale. The Department's objective of expediting the promulgation process was a valid one given the fact that almond handling for the crop year had already begun by the time the proposed rule was published.

Moreover, there is no credible evidence that the comment period and effective date of the assessment rule in any way affected the interests of the Petitioners. Petitioners were given a fair opportunity to comment on the rule. As noted by the Department, the Almond Board budget on which the assessment rule was based had been discussed extensively in Board proceedings. *See* 53 Fed. Reg. 43849 (October 31, 1988). Petitioners certainly knew the rate that would be proposed to the Secretary and had ample time even prior to the call for comments to draft their objections. As to the effective date chosen, there is no evidence that Petitioners or others were surprised or suddenly found themselves out of compliance with the rule on October 31, 1988. In the absence of these factors, I find that there was good cause within the meaning of 5 U.S.C. § 553(d) to dispense with the general requirement of delayed effective date. Therefore, I cannot conclude that the Department's decisions to use a 10-day comment period and an effective date coinciding with the date of publication are so defective as to constitute independent grounds for invalidating the assessment rule.

Petitioners also argue that assessments on reserve almonds are unauthorized under the Order. They further maintain that the fraction of the 1988-89 assessment rate, which is attributable to budgeted creditable advertising expenses (2.5 cents), cannot rationally be applied to almonds that must be withheld from the market. According to Petitioners, this method of computing the amount of their assessment is arbitrary because it effectively forces them to advertise almonds that they are prohibited from selling.

It is the settled agency construction of the Order that all almonds received by a handler during the crop year are assessable. This interpretation is entitled to great weight and must stand if it is reasonable. *County Line Cheese Co. and Meadow Gold Dairy*, 44 Agric. Dec. at 87. Petitioners argue that it is not.

Petitioners urge that considering the Order provisions for assessments and the provisions for reserve withholding *in pari materia* yields the conclusion that reserve almonds are not subject to assessments. 7 C.F.R. § 981.81 provides for assessments on all almonds "received" by a handler "for his own account." However, § 981.52 states that handlers must hold reserve almonds "for the account of the Board." Therefore, Petitioners argue, reserve almonds are not assessable because they are not received by a handler "for his own account."

This interpretation of the Order is incorrect. Although reserve almonds are *held* for the account of the Board, those almonds are initially *received* by a handler for his own account. The quantity of almonds that a handler must set aside as reserve is calculated as a percentage of all almonds that he receives for his own account. *See* 7 C.F.R. § 981.50. Therefore, reserve almonds that are held for the account of the Board were necessarily first received by the handler for his own account. Almonds acquire reserve status *based upon* their receipt by the handler for his own account. For this reason, the quantity of almonds received by a handler for his own account necessarily includes any fractional part of that quantity that is thereafter set aside to satisfy the handler's reserve obligation.

Furthermore, the intent of the Order to include reserve almonds in the category of assessable almonds is clearly expressed in the original Notice of Recommended Decision. The Notice states in part:

> The order should provide that all handlers shall pay an assessment ... per pound of edible kernels received by them for their own accounts (except receipts from other handlers on which assessments have been paid), whether salable or surplus [i.e., reserve], during the crop year.

15 Fed. Reg. 3639 (June 9, 1950). This language, together with the logical structure of the Order provisions discussed above,

nullifies Petitioners' argument against the levying of assessments on reserve almonds.

Petitioners also suggest that the levy on reserve almonds violates the requirement of the Act that assessments reflect each handler's pro rata share of expenses. *See* 7 U.S.C. § 610(b)(2)(ii). This is also incorrect. Assessments on reserve almonds do not affect the equity of the levy, since the reserve scheme requires every handler to withhold a uniform percentage of all almonds he has received for his own account in a given crop year.

Petitioners next urge that levying assessments on reserve almonds effectively forces handlers to advertise almonds that they may not sell. This argument apparently assumes that the Act or Order requires some specific relationship between budgeted advertising expenses and the volume of almonds made available for sale in a given crop year. There is no such requirement. Nor is there any linkage between specific budget items and the formula used to ensure equitable distribution of the *total* financial burden of the Order among all handlers.

The advertising program under the Order is intended to effectuate the Act's policy of improving returns to growers by increasing the demand for almonds. Although the Department has expressed belief that advertising generally aids the entire industry, 53 Fed. Reg. 43,849 (October 31, 1988), the creditable advertising program is properly viewed as requiring handlers to contribute pro rata to a program designed primarily to benefit another segment of the industry — the almond growers. It is therefore incorrect to analyze a given handler's advertising obligation in terms of its relationship to specific benefits which he might realize as a result. Congress has authorized the establishment of handler advertising programs "designed to assist, improve, or promote the marketing, distribution, and consumption" of almonds. *See* 7 U.S.C. § 608c(6)(I). And the application to reserve almonds of the creditable advertising assessment rate is simply the method chosen to equitably apportion the burden of this program among the handlers in the industry. As previously stated, differential economic effects generated by a marketing order are not necessarily fatal to its validity.

Even assuming, *arguendo*, a linkage between advertising assessments and specific benefits to handlers, assessments on reserve almonds do not necessarily force handlers to advertise almonds which they may not sell. Reserves may be, and frequently are, reduced or released completely in response to new analyses of trade demand. Thus, the advertising dollars which petitioners characterize as corresponding to almonds held in reserve in fact corresponded to salable almonds after the 1988-89 reserve was released on July 31, 1989. *See* 54 Fed. Reg. 31502 (July 31, 1989). Moreover, it is not unreasonable to assume that advertising which raises demand in the course of a crop year may increase the prospects that the reserve in force for that year will be reduced or eliminated, enhancing the marketability of the affected almonds. Petitioners' argument also ignores the possibility that advertising has cumulative, long-term effects upon demand. In sum, petitioners' contention reflects a fundamental misunderstanding of the purposes and effects of the handler advertising program. It is rejected for each of the reasons discussed above.

Petitioners' final objection to the assessment rule focuses upon the Department's statement of basis and purpose. Petitioners maintain that the Department failed to discuss with sufficient specificity the reasons for its adoption of the Board's recommended budget. This argument is unavailing.

It is established beyond doubt that the marketing order program is a cooperative venture between the Secretary and the various commodity industries. *See, e.g., Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). Under normal circumstances, the Secretary does not substitute his judgment as to the best means of marketing a crop for that of the industry. *Sequoia*, 47 Agric. Dec. at 187. And, as noted above, selection of the specific means of effectuating the declared policy of the Act is within the discretion of the Secretary.

Petitioners have not shown that the Secretary failed to consider all relevant factors before adopting the budget recommendation of the Board. *See Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). In its discussion of the final assessment rule, the Department clearly stated its finding that the rule adopting the recommendation of the Board would tend

to effectuate the declared policy of the Act. In its response to comments on the advertising budget, the Department specifically declared its belief that advertising and market promotion activity "benefits all handlers and growers by increasing demand for all almonds." 53 Fed. Reg. 43849 (October 31, 1988). Petitioners have presented no credible evidence which would tend to show that the Department's position is arbitrary, capricious, or unreasonable. They have failed to demonstrate the absence of "a rational connection between the facts found and the choice made." *Sequoia*, 47 Agric. Dec. at 90, quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). I therefore conclude that the statement of basis and purpose issued in support of the assessment rule is not so defective as to constitute an independent basis for invalidating the rule.

D. The Almond Board's act of placing an informational newspaper advertisement imposed no legal obligation upon petitioners and is therefore not reviewable in this proceeding.

Petitioners also attack, as unauthorized, the Board's act of placing a newspaper advertisement informing growers of their obligations under the Order should they engage in acts of handling. The use of news media to assist the industry by disseminating accurate information as to possible Order requirements is well within the Board's authority to administer the Order. The advertisement was not misleading nor did it create any legal obligation. Because it did not create an obligation binding upon petitioners or others, I conclude that the Board's act of placing the advertisement is not reviewable in this proceeding.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners' appeal consists, in the main, of a restatement of the arguments made before the ALJ, and correctly decided by the ALJ. No further discussion of these issues is necessary.

Petitioners seek a specific statement by the Judicial Officer as to the availability of damages in a § 8c(15)(A) proceeding. I agree with the ALJ's views, in this respect, which I omitted because of

disagreement with other matters. The ALJ's views with which I agree are as follows (Initial decision at 22 n. 1):

> It should be noted that in proceedings under section 8c(15)(A) of the Act, the assessment of monetary damages is not authorized, and the extent to which Petitioners have been damaged is not an issue that may be considered in that context. Petitioners' change of economic position in anticipation of a 25% reserve rule is, however, relevant to their claims under the just compensation clause of the fifth amendment. (See discussion of this issue, *infra*.)

My views as to damages are set forth at greater length in *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23, slip op. at 98-105, 115-16, 122, 148-52, 166-67 (Jan. 23, 1991), *appeal docketed,* No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), which is attached as an Appendix to this decision.

As to the ALJ's holding that the Secretary's rulemaking action, setting handler assessments for the 1988-89 crop year, was not in accordance with law since it was retroactive (Initial Decision at 34-35), I disagree for the reasons set forth in *Saulsbury*, *supra*, at 152-67.[4] *See also Saulsbury, supra*, at 132-52.

My views that the Secretary's rulemaking action setting handler assessments for the 1988-89 crop year was not invalid retroactive action are equally applicable to the issue as to whether the Secretary's rulemaking action, requiring handlers to withhold and reserve 25% of the almonds handled during the 1988-89 crop year, was invalid retroactive action. In this respect, I am in agreement with respondent's appeal petition, which states (Appeal Petition at 11-14):

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[4] Here, as in *In re Cal-Almond, Inc.*, 50 Agric. Dec. 171, slip op. at 16 n. 7 (Feb. 28, 1991), although *Cal-Almond, Inc.*, is a petitioner in the present case and in *Saulsbury*, it makes no difference whether *res judicata* or *stare decisis* is applicable to *Cal-Almond's* claims.

II. THE ESTABLISHMENT OF THE RESERVE AND SALABLE PERCENTAGES FOR THE 1988-89 CROP YEAR WAS NOT RETROACTIVE AND WAS IN ACCORDANCE WITH LAW.

For the same reasons as discussed above, the Judge's decision that the reserve rule is unlawful to the extent that a reserve percentage was imposed upon almonds handled prior to the promulgation of the final reserve rule is erroneous. This rule operates prospectively, and was not promulgated in violation of the APA or the Act.

The Act provides that the Secretary has the authority to issue regulations which establish and maintain orderly marketing conditions, and states that it is the policy of Congress to provide an orderly flow of supply to avoid unreasonable fluctuations in supplies and prices. 7 U.S.C. § 602. In order to effectuate this policy, the Secretary promulgated volume regulations in the Almond Order. Pursuant to formal rulemaking proceedings, regulations have been issued that impose handling restrictions on almond handlers. These regulations provide that a salable and a reserve percentage shall be established during a crop year when the Secretary determines, from information supplied by the Board and by other information, that a reserve would tend to effectuate the policy of the Act. 7 C.F.R. § 981.46-.47. The regulations provide that the Secretary shall consider such factors as the ratio of estimated trade demand to the estimated production of marketable almonds, or the allocation quantity of almonds, whichever is applicable. 7 C.F.R. § 981.47. This rule setting forth the *procedure* for the establishment of a reserve operates prospectively only.

The regulations further provide that the Secretary may decrease the reserve amount as he obtains revised crop estimates, or as supply or demand conditions change. This may be done during the crop year. 7 C.F.R. § 981.48. The regulations further provide that the Board shall furnish the Secretary with the necessary and most current market information, and shall recommend a proposed salable and reserve percentage by August 1 of the pertinent crop year. 7 C.F.R. § 981.49. In order to consider all of the necessary information, the Secretary must promulgate the reserve rule during the crop year to be regulated.

A proposed rule was published in the Federal Register on September 16, 1988, that gave notice of a proposal to establish salable, reserve, and export percentages of 75%, 25%, and 0% respectively, for almonds received by handlers during the 1988-89 crop year. 53 F.R. 36051 (1988). This proposed rule for salable and reserve percentages was based upon a recommendation of the Board and upon other available market information for the 1988-89 crop year (53 F.R. 36052), and the Secretary found that this rule would tend to effectuate the declared policy of the Act. He therefore issued a final rule establishing salable and reserve percentages on January 25, 1989, to take effect 30 days after the date of publication. 54 F.R. 3584 (1989).

No handler was legally obligated to withhold from handling a reserve percentage before a reserve percentage rule was promulgated. Therefore, neither the rule establishing the procedure for determining the reserve percentage, nor the actual rule establishing a reserve percentage, is unlawfully retroactive, as the Judge found in his Decision below.

The Supreme Court in *Bowen* determined that the rule in question was not authorized by the Medicare Act. It did not reach the question of whether the rule violated the APA. The Act in this case gives abundant authority to the Secretary to issue rules that maintain orderly marketing conditions, and states that it is the policy of Congress to allow the Secretary discretion to promulgate regulations to effectuate this purpose. *See* 7 U.S.C. 608c(6)(E). Pursuant to this authority, the Secretary has established a scheme that will control harmful market fluctuations in the California almond industry by the restriction of the handling of almonds at certain times. Therefore, the reserve program is not in violation of the Act.

Additionally, the reserve rules are not in violation of the APA, which provides that rules should have future effect. 5 U.S.C. § 551(4). Unlike *Bowen*, no almond handler's rights were affected by a change in policy or procedure. No handler was injured or could reasonably be expected to be injured by acting in reliance [on] a prior rule. In fact, the handlers knew in July of 1988 that there was a strong possibility that a reserve percentage would go into effect for the 1988-89 crop year, because a reserve percentage

of 25% had been recommended to the Secretary by the Board. As stated in Justice Scalia's concurrence in *Bowen,* this rule did not alter the *past* legal consequences of past actions, and therefore it was not illegally retroactive. *Supra*, at 477.

As found in *Chemical Waste* [*Management, Inc. v. EPA*, 869 F.2d 1526 (D.C. Cir. 1989)], the fact that a regulation imposes a future liability on past actions does not render it retroactive. *Supra*, at 1536. The reserve rule does not regulate past activity. Instead, it establishes a prospective reserve requirement using all almonds handled in the crop year in the calculation. In simplest terms, no handler would be retroactively held liable for failure to maintain the 25% reserve during the 1988-89 season before the reserve requirement was made effective on February 25, (1989). 54 F.R. 3584 (1989).

The Secretary carefully evaluated the Almond Board's recommendation in light of current marketing conditions, and issued a rule as promptly as possible under the circumstances. He found that a reserve of 25% of all almonds handled that crop year necessary to effectuate the declared purpose of the Act by regulating market fluctuations and maintaining prices for almonds. As established in the rulemaking proceeding establishing the reserve provisions of the Order, it is necessary for this rule to consider all almonds handled during the crop year in order to further Congressional policy, and impose restrictions on all handlers equally. Thus, the reserve rule was not unlawfully retroactive. To the extent that it has retroactive tendencies, as stated previously, it is clearly authorized by and is not in violation of the Act.

For the foregoing reasons, the following order should be issued.

Order

The relief requested by petitioners is denied and the petitions are dismissed.

APPENDIX

In re *Saulsbury Orchards* & Almond *Processing,* Inc., 50 Agric. Dec. 23 (Jan. 23, 1991), *appeal docketed,* No. CV-F-91-064 REC (E.D. Cal. Feb. 8,1991).

APPENDIX M

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-17160, 94-17163,
94-17164, 94-17166,
94-17167, 94-17182

D.C. Nos. CV-91-0064-REC,
CV-91-0122-REC, CV-91-0123-REC,
CV-91-0685-REC, CV-92-5684-REC,
AND CV-86-0087-REC

CAL-ALMOND, INC., A CALIFORNIA CORPORATION;
SAULSBURY ORCHARD AND ALMOND PROCESSING INC.;
CARLSON FARM, A SOLE PROPRIETORSHIP,
PLAINTIFFS-APPELLEES

v.

Department of Agriculture
Defendant-Appellant

[Filed: Mar. 3, 1998]

ORDER

Before: CHOY, SCHROEDER, and BRUNETT, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing. Judge Schroeder and Judge Brunetti have voted to reject the suggestion for rehearing en banc, and Judge Choy so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX N

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* provides, in pertinent part:

* * * *

§ 608a. Enforcement of chapter

* * * *

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana; California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above (except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing or other processing), hops, honeybees and naval stores as included in the Naval Stores act [7 U.S.C. 91 *et seq.*] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghum, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for

canning, freezing, or other processing[1] and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for purposes of subsection (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

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[1] So in original. Probably should be followed by a comma.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any specified grade, size, or quality thereof, produced during any period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during specified period of periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or

all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more of a combination of the following: The total quantity of hops available or estimate will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15) U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects tobe paid from funds collected pursuant to the marketing order: *Provided*, That with

respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further,* That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from the State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers

thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, or an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(15) Petition by handler for modification of order or exemption: court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for

a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity. for the purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

* * * * *

§ 610. Administration

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(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, when in his judgement they are qualified to do so, to act as agents of their members and patrons in connection with the

distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2)(i) Each order relating to milk and its products issued by the Secretary under this chapter shall provide * * *

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate and for the maintenance and functioning of such authority or agency, other than expenses occurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement of marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) Any authority or agency established under an order may maintain in its own name, or in the name of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several district courts of

the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) Regulations; penalty for violation

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * *

APPENDIX O

Title 7 of the Code of Federal Regulations (1992) provided, in relevant part:

PART 981 - ALMONDS GROWN IN CALIFORNIA

* * * * *

§ 981.30 Establishment.

A Board of ten members, with an alternate member for each such member, is hereby established.

* * * * *

§ 981.38 Powers.

The Board shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate and report to the Secretary complaints of violations of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 981.39 Duties.

The Board shall have, among other things, the following duties:

(a) To act as intermediary between the Secretary and any handler or grower;

(b) To keep minute books and records which will clearly reflect all of its acts and transactions, and such minute books and records shall be subject to examination by the Secretary at any time;

(c) To investigate the growing, shipping, and marketing conditions with respect to almonds and to assemble data in connection therewith;

(d) To furnish to the Secretary such available information as may be deemed pertinent or as he may request;

(e) To appoint such employees as it may deem necessary and to determine the salaries, define the duties and fix the bonds of such employees; and

(f) To cause the books of the Board to be audited by one or more competent certified public accountants at least once for each crop year, and at such other times as the Board may deem necessary or as the Secretary may request; and the report of each such audit shall show, among other things, the receipt and expenditure of funds pursuant hereto: and to file with the Secretary three copies of all audit reports made.

§ 981.40 Procedure

(a) *Organization and rules.* The members of the Board shall select a chairman from their membership. The Board shall select such other officers and adopt such rules for the conduct of its business as it may deem advisable. The Board shall give to the Secretary or his designated agent and representatives the same notice of meetings of the Board as is given to members of the Board.

* * * * *

(d) *Right of the Secretary.* The members of the Board (including successors or alternates), and any agent or employee appointed or employed by the Board, shall be subject to removal or suspension by the Secretary at any time. Each and every order, regulation, decision, determination, or other act of the Board shall be subject to the continuing right of the Secretary to disapprove of the same act at any time, and, upon such disapproval, shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith.

(e) *Additional voting requirements.* Adoption of recommendations by the Board with respect to projects pursuant to § 981.41 involving production research, marketing research and development projects, and marketing promotion including paid advertising and crediting the pro rata expense assessment obligation of handlers with such portion of their direct expenditures for

marketing promotion including paid advertising, shall require at least seven affirmative votes.

§ 981.41 Research and development.

(a) *General.* The Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) or credited pursuant to paragraph (c) of this section.

(b) *Authorization.* If, on the basis of a Control Board recommendation pursuant to § 981.40(e) with respect to projects pursuant to this section, and appertaining rules and regulations established by the Secretary on recommendation of the Board, and other available information, the Secretary concurs that such activities should be permitted, he shall authorize such activities.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspaper, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent: *Provided*, That with respect to paid advertising, advertising production costs, preparation expenses, travel allowances, and other expenses not directly connected with paid space or time, and costs relating to pretesting of advertising, test marketing, directory advertising, point of sales materials, premiums, and trade pro-

motion allowances shall not be eligible for credit against a handler's assessment obligation.

(d) *Promotion guidelines.* All marketing promotion activity engaged in by the Board, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising shall refer to any private brand, private trademark or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product;

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity; and

(4) Upon conclusion of each activity, but at least annually, the Board shall summarize and report the results of such activity to its members and to the Secretary.

(e) *Rules and regulations.* Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

* * * * *

§ 981.80 Expenses.

The Board is authorized to incur such expenses as the Secretary may find are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the Board, including the accumulation and maintenance of an operating reserve fund, and for such purposes as the Secretary may, pursuant to the provisions of this subpart, determine to be appropriate. The recommendation of the Board as to the expenses for each such year, together with all data supporting such recommendation, shall

be submitted to the Secretary on or before August 1 of the crop year in connection with which such recommendation is made.

§ 981.81 Assessment.

(a) *Requirement for payment.* Each handler shall pay to the Board on demand by the Board, from time to time, such sum less any amounts credited pursuant to § 981.41, based on such rate per pound of almonds, kernel weight basis, received by him for his own account (except as to receipts from other handlers on which assessments have been paid) as the Secretary finds is necessary to provide funds to meet the authorized board expenses and the operating reserve requirements, and establishes for the crop year. Upon redetermination of the kernel weight of almonds received by handlers for their own account as provided in § 981.61, such redetermined kernel weight for each handler, adjusted for receipts on which assessments have been paid, shall be the basis upon which he shall pay assessments. At any time during or after a crop year, the Secretary may increase the rate of assessments to apply to all such almonds during such crop year to secure sufficient funds to cover the expenses authorized by § 981.80 or by any later finding by the Secretary relative to the expenses of the Board, and such additional assessments shall be paid to the Board by each handler on demand. The payment of assessments for the maintenance and functioning of the Board may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

* * * * *

§ 981.441 Crediting for marketing promotion including paid advertising.

(a) In order for a handler to receive credit for his marketing promotion expenditures, including paid advertising, against his pro rata expense assessment obligation pursuant to § 981.41(c), the Board shall determine that such expenditures meet the applicable requirements of this section.

(b) Each paid advertisement must be published, broadcast, or displayed and other marketing promotion activities must be conducted during the crop year for which credit is requested, except that a handler may receive credit up to a maximum of 40

percent of his total creditable advertising and promotion obligation as of the June 30 redetermination report for expenditures made for advertisements published, broadcast, or displayed and other marketing promotion activities conducted no later than December 31 of the subsequent crop year. A handler utilizing this extension shall: (1) File any required documentation with the Board no later than the following January 31, and (2) certify to the Board, at the time of the June 30 redetermination, his planned expenditures during the extension period.

(c) The following requirements shall apply to crediting for paid advertising:

(1) Credit granted by the Board for paid advertising shall be that which is appropriate when compared to the applicable outlet rate published in the domestic or Canadian catalogs of Standard Rate and Data Service or station, publisher, or outdoor rate cards. In the case of claims for credit not covered by any such source, the Board shall grant the claim if it is consistent with rates for comparable outlets. For advertisements in markets other than the United States and Canada, paragraph (c)(4) of this section shall apply.

(2) The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

(3) Credit for paid advertising shall be granted:

(i) For 100 percent of a handler's payment to an advertising medium:

(A) For a generic advertisement of California almonds;

(B) For an advertisement of the handler's brand of almonds;

(C) When either of these advertisements includes reference to a complementary commodity or product;

(D) For a trade media advertisement that displays branded food products containing almonds, or announces a handler's future promotion activities, including joint promotions, and the entire expenditure is borne by the handler;

(E) For in store supermarket advertisements using fixed position, video media, or light emitting diode (LED) signs, when such payments are made through an advertising firm or company which specializes in the production of LED advertisements and the placement of those advertisements: *(1)* Fixed position advertisements must include one or more of the following: *(i)* Processed color displays enclosed in plastic frames and mounted on supermarket shopping carts; *(ii)* overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or *(iii)* processed color advertisements enclosed in frames and mounted on a supermarket shelf; *(2)* Video advertisements must be shown on a fixed video monitor running television commercials or infomercials for specific products on a rotating basis; *(3)* LED advertisements must be shown on an in-aisle LED screen running specific product messages on a rotating basis; or

(F) For processed color displays enclosed in frames mounted on fixtures outside and in front of retail food stores when payments are made through an advertising firm.

(ii) For an advertisement resulting from joint participation by a handler and a manufacturer or seller of a complementary commodity or product, and including the brands of both, the credit shall be 50 percent of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iii) For an advertisement resulting from joint participation by a handler and manufacturers or sellers of two complementary commodities or products, and including the brands of all three, the credit shall be one-third of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iv) When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50 percent raw shelled almonds by weight, and (C) the almond product displays the handler's brand and: *Provided further*, That, if the product is advertised with forms of almonds for which 100 percent credit is allowed, the advertisement

shall receive 100 percent credit provided it meets the criteria of paragraph (c)(3)(iv) (A), (B), and (C) of this section. With respect to almond butter advertising, the credit shall be 100 percent of the total allowable payment to the advertising medium or 100 percent of the handler's payment thereof, whichever is less. For the handler to receive credit, the almond butter must meet the specifications contained in § 981.466, and the handler's brand must be displayed.

(4) Credit for media expenditures in a foreign market shall be granted:

(i) For handlers' unreimbursed media expenditures for advertising in any foreign market pursuant to a contract with the Foreign Agricultural Service, U.S. Department of Agriculture, and/or the California Department of Food and Agriculture, provided the advertisements meet the requirements of paragraphs (c)(2) and (3) of this section and the limitations of paragraphs (c)(5)(i) and (ii) of this section. Such advertising in foreign markets shall not be creditable unless the handler certifies on ABC Form 31 that said handler was not and will not be reimbursed for such advertising by the Foreign Agricultural Service or the California Department of Food and Agriculture and submits to the Board copies of all claims for reimbursement filed with the Foreign Agriculture Service and/or California Department of Food and Agriculture.

(ii) For a handler's media expenditures for brand advertising in any country where California almonds are sold, credit shall be allowed when claims are substantiated by applicable rate cards. The provisions of this section applicable to domestic advertising shall also apply to the crediting of advertising in these markets.

(5) Credit granted a handler shall be subject to other conditions as follows:

(i) No credit shall be granted to a handler when more than two complementary branded products are included in an advertisement.

(ii) Advertisements which, in addition to promoting California almonds, also mention or promote the sale of

noncomplementary commodities or products, or of competing nuts, shall not be eligible for credit.

(iii) Advertisements which direct consumers to one or more named retail outlets, other than handler operated, shall not be eligible for credit.

(6) A handler must file a claim with the Board to obtain credit for an advertising expenditure. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that documentation will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance as follows:

(i) For published advertisements, submit a copy of the publication, invoice, agency invoice, if any, and tear sheet of the advertisement.

(ii) For radio advertisements, submit a copy of the station invoice, a copy of the script, or reference to a copy on file with the Board, and the agency invoice, if any.

(iii) For television advertisements, submit a copy of the station invoice, a copy of the script and tape or story board of the advertisement, or a reference to these in the Board files, and the agency invoice, if any.

(iv) For outdoor advertisements, submit a copy of the company invoice, a photograph of the display or a reference to a photograph in the Board files, and the agency invoice, if any.

(v) For in-store supermarket advertising and for mounted advertising enclosed in frames outside and in front of retail food stores, submit a copy of the company invoice, a copy of the actual advertisement or video tape, a published rate card from a nationally recognized company, and a copy of the agency invoice, if any.

(vi) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in § 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

(d) The following requirements shall apply to crediting for marketing promotion other than paid advertising:

(1) Credit for marketing promotion expenditures shall be granted:

(i) For the distribution of sample packages containing one-half ounce or less of almonds to charitable or educational outlets. For the purpose of this section, the term *charitable outlet* means an organization to which a charitable contribution as defined in section 170(c) of the Internal Revenue Code (26 U.S.C. 170(c)) may be made. Such sample packages shall be packed for the Board under its generic label and sold to the distributing handlers at the price paid for them by the Board. Credit shall be based on the price a handler pays the Board for such packages and upon receipt by the Board of acceptable proof of distribution. Such sample packages may or may not be personalized with an individual handler's label. Credit applicable to the distribution of sample packages shall be subject to the following conditions:

(A) A handler may receive credit for 150 percent of the purchase price of such packages against the creditable assessment obligation incurred on the first 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(B) A handler may receive credit for 100 percent of the purchase price of such packages against the creditable assessment obligation incurred on the section 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(C) No credit shall be granted in excess of the creditable assessment obligation incurred on 8,000, 000 redetermined kernel weight pounds received by a handler during a crop year.

(D) No credit shall be granted for sample packages distributed to market segments where almonds are already being

sold. Handlers shall obtain approval from the Board prior to distribution to ensure that this condition is met.

(E) No credit shall be applicable to the distribution of sample packages in outlets where they will be used for resale.

(F) Handlers must place written orders for sample packages with the Board no later than February 1 of any crop year except to the extent that handlers use the deferment provision found in paragraph (b) of this section: *Provided*, That for the 1988-89 crop year, handlers must place written orders no later than March 5, 1989. Handlers must place written orders for sample packages with the Board no later than August 15 of any crop year to receive credit for up to 40 percent of their creditable assessment obligations when using the deferment provision pursuant to paragraph (b) of this section.

(G) Handlers must file claims with the Board in order to receive credit for distribution of sample packages. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of distribution will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed or or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC From 31 and accompanied by appropriate proof of performance. This proof shall consist of a signed statement from the organization to which sample packages were distributed, on that organization's letterhead, stating:

(1) The name and address of the handler from whom the packages were received;

(2) The date of receipt;

(3) The volume of packages received;

(4) How such packages will be used; and

(5) A statement that such packages will not be used for resale.

(ii) For promotion materials available from the Board and sold to handlers at the price paid for them by the Board. Credit shall be granted for the amount a handler pays the Board for such materials upon purchase. Such materials may or may not be personalized with the label of any individual handler.

(iii) For costs directly related to mail order promotion subject to the follow conditions;

(A) Credit shall only be granted for the following expenditures;

(1) For the purchase of mailing lists to conduct mail order promotions.

(2) For the cost of envelopes and postage to mail promotional materials.

(B) Credit for mail order promotion shall be limited to a total of $25,000 or 25 percent of a handler's creditable assessment per crop year, whichever is greater.

(C) Handlers must file claims with the Board in order to receive credit for mail order promotion expenditures. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of performance will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proofs of performance such as invoices or postal receipts.

(e) Credit shall be granted for payments made to the Board for use by the Board for generic marketing promotion including paid advertising subject to the following conditions:

(1) A handler may receive credit for 150 percent of a payment made to the Board against creditable assessment obligation.

(2) When a handler elects to use this method of crediting for all or a portion of such handler's assessment obligation, the handler may use the extension provided for pursuant to paragraph (b) of this section for handler's deferred advertising and promotion obligation.

(3) Handlers must file claims with the Board on ABC Form 31 in order to receive credit for payments made to the Board. No credit shall be granted unless a claim is filed on or before January 31 of the then current crop year: *Provided*, That for the 1988-89 crop year for claims not previously filed on or before January 31, 1989, a claim or supplementary claim must be filed with the Board on ABC Form 31 on or before March 31, 1989. Payments must be made as follows: One-fourth of total claim on or before January 31; one-fourth on or before March 31; one-fourth on or before May 31; and one-fourth on or before June 30 of the then current crop year: *Provided*, That for the 1988-89 crop year, payments not previously made on or before January 31, 1989 must be made as follows: One-third on or before March 31, 1989; one-third on or before May 31, 1989; and one-third on or before June 30,1989. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment deadline of this paragraph credit for payment shall revert to the 100 percent basis.

FILED

JUL 31 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1935

In the Supreme Court of the United States

OCTOBER TERM, 1997

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether California almond handlers may, consistent with the First Amendment, be required to fund a generic advertising and promotion program for almonds and almond products under an agricultural marketing order similar to that upheld in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. A prior opinion of the court of appeals concerning remedial issues (Pet. App. 2a-14a) is reported at 67 F.3d 874. The order of the district court (Pet. App. 15a-32a) and the judgment of the district court (Pet. App. 33a-37a) concerning remedial issues are unreported.

The initial opinion of the court of appeals (Pet. App. 38a-71a), which addressed the First Amendment question presented in the petition, is reported at 14 F.3d 429. The four district court orders that were the subject of the court of appeals' initial opinion (Pet. App. 72a-148a) are not officially reported. Three of those orders are published, however, at 51 Agric. Dec. 44,

85, and 79. The opinions of the judicial officer of the Department of Agriculture (Pet. App. 149a-355a) are reported at 50 Agric. Dec. 23, 171, and 183.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1997. A petition for rehearing was denied on March 3, 1998. Pet. App. 356a. The petition for a writ of certiorari was filed on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Almond handlers (*i.e.*, processors and distributors) in the State of California are regulated by a marketing order issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The AMAA was enacted "in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2134 (1997) (citing 7 U.S.C. 602(1)).

The AMAA authorizes the Secretary of Agriculture to issue marketing orders for certain commodities, including almonds. 7 U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). It may also provide for "production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). Such projects may—with respect to certain commodities, including almonds—include "paid advertising." *Ibid.* The projects are funded by mandatory assessments on han-

dlers. *Ibid*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay assessments equal to their pro rata share of expenses of administering marketing orders). The AMAA authorizes the marketing orders for almonds and a few other commodities to allow a handler to receive credit against its assessment for amounts that it spends on certain advertising of its own. 7 U.S.C. 608c(6)(I).

Before issuing a marketing order for a commodity, the Secretary of Agriculture must conduct a formal rulemaking proceeding and, in most cases, obtain approval of the order either from two-thirds of the producers of the commodity covered by the order or from producers who market two-thirds of the volume of the commodity. 7 U.S.C. 608c(8). The marketing order is administered by a committee, which generally is composed of producers and handlers of the commodity, under the supervision of the Secretary. 7 U.S.C. 608c(7)(C), 610. The Secretary appoints the members of the committee and may remove them at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d) (relating to Almond Board of California). The committee recommends an annual budget for administering the marketing order, which may include expenditures for advertising and other promotional activities. The Secretary may accept or reject the recommended budget. 7 U.S.C. 608c(12); 7 C.F.R. 981.38; 7 C.F.R. 981.41. After adopting a budget, the Secretary promulgates a regulation prescribing assessments on handlers to fund the budgeted activities. See 7 U.S.C. 610(c); 7 C.F.R. 981.41(e), 981.80, 981.81(a).

A marketing order may be discontinued for either of two reasons. First, the Secretary of Agriculture must terminate or suspend a marketing order if he finds that it "obstructs or does not tend to effec-

tuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). Second, the Secretary must terminate a marketing order if he determines that a majority of the producers do not support it. 7 U.S.C. 608c(16)(B).

2. This case concerns the marketing order for California almonds, which is administered by the Almond Board of California, a committee of almond growers and handlers appointed by the Secretary of Agriculture. The marketing order was first promulgated in 1950. Since 1971, the marketing order has authorized the Almond Board to conduct a generic advertising and promotion program for California almonds. See 36 Fed. Reg. 20,887 (1971). The Board's activities, including its generic advertising and promotion program, are funded by mandatory assessments on handlers based on the volume of almonds that they handle. See 7 C.F.R. 981.41(a), 981.81(a). As authorized by the AMAA, the marketing order permits an almond handler to receive a credit against a portion of its assessment for conducting its own promotional activities, including paid advertising, provided that those activities meet certain regulatory guidelines. See 7 U.S.C. 608c(6)(I); 7 C.F.R. 981.41(c), 981.441. Those private activities are known as "creditable advertising."

During the crop years at issue, the creditable advertising regulation provided that a handler could receive credit only for advertisements that had "[t]he clear and evident purpose" of "promot[ing] the sale, consumption, or use of California almonds." 7 C.F.R. 981.441(c)(2) (1992).[1] No credit was available for ad-

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[1] This case concerns the generic advertising programs for California almonds for the crop years 1980-1981 through 1991-1992. The creditable advertising regulations for California al-

vertising that promoted products containing less than 50 percent almonds, that referred to "more than two complementary branded products," that promoted "noncomplementary" products or "competing nuts," or that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. 981.441(c)(3)(iv) and (c)(5) (1992).

3. Petitioners, who are California almond handlers subject to the almond marketing order, petitioned the Secretary of Agriculture for relief from the order pursuant to 7 U.S.C. 608c(15)(A).[2] They contended, among other things, that the generic advertising program for California almonds, including certain provisions of the creditable advertising regulation, violated the First Amendment. The judicial officer of the Department of Agriculture rejected petitioners' First Amendment challenge. Pet. App. 179a-180a, 220a-225a, 315a-316a.

Petitioners sought review of the judicial officer's decisions in federal district court pursuant to 7 U.S.C. 608c(15)(B). The court affirmed the judicial officer's decisions, including the rejection of petitioners' First Amendment claim. Pet. App. 87a, 144a-145a.

The Ninth Circuit reversed in relevant part, holding that the generic advertising program for California almonds violated the First Amendment. Pet. App.

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monds have been revised substantially since that time. See 7 C.F.R. 981.441(e)(4).

[2] The AMAA provides a handler with the opportunity to petition the Secretary of Agriculture for relief from any provision of a marketing order on the ground that the provision is "not in accordance with law." 7 U.S.C. 608c(15)(A). A handler who is dissatisfied with the Secretary's disposition of the petition may seek judicial review in federal district court. 7 U.S.C. 608c(15)(B).

42a-53a. The court applied the three-pronged test of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), to evaluate the constitutionality of the generic advertising program as a regulation of commercial speech. Pet. App. 45a-53a. The court agreed that the first prong of the *Central Hudson* test was satisfied because the generic advertising program was designed to serve a "substantial" governmental interest—*i.e.*, to "stimulat[e] the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry." *Id.* at 47a.

The court of appeals held, however, that the generic advertising program did not satisfy the second prong of the *Central Hudson* test, which requires that the challenged regulation "directly advance" the government's asserted interest. Pet. App. 48a (quoting *Central Hudson*, 447 U.S. at 566). The court focused initially on the creditable advertising portion of the generic advertising program. *Id.* at 48a-52a. The court reasoned that the government had not established that the creditable advertising regulations directly advanced the sale of California almonds, because the government had not shown "that the advertising for which credit is *granted* is *better* at selling almonds than the [Almond] Board's own efforts and that the advertising for which credit is *denied* is *worse* at selling almonds than the Board's own efforts." *Id.* at 48a. The court went on to conclude that the generic advertising program, as a whole, failed to satisfy the second prong of *Central Hudson*, because the government had not shown that advertising conducted under the program sold almonds more effectively than would advertising by individual handlers. *Id.* at 52a.

The court of appeals also held that the generic advertising program failed the third prong of the *Central Hudson* test, which requires that regulation of commercial speech be narrowly tailored to further the government's asserted interest. Pet. App. 52a-53a. The court based that holding primarily on its determination that the government had "offer[ed] *no* justifications for the restrictions that *deny* credit for certain advertisements." *Id.* at 53a.

The court of appeals remanded the case to the district court to fashion an appropriate remedy. Pet. App. 70a-71a.[3]

4. On remand, the district court ordered the government to pay petitioners approximately $4.3 million, an amount that corresponded to approximately $1.8 million in assessments that petitioners had paid to the Almond Board or into a court escrow account and $2.5 million that petitioners had paid to third parties for creditable advertising. Pet. App. 34a-37a.

The Ninth Circuit affirmed in part and reversed in part. Pet. App. 2a-14a. The court held that sovereign immunity barred the government from being required to reimburse petitioners for their expenditures on creditable advertising. *Id.* at 8a. The court affirmed the district court's refusal to reduce the amount of the refund to take into account the benefits that

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[3] The court of appeals rejected petitioners' other challenges to the administration of the marketing order for California almonds, which concerned the procedures by which assessments were imposed under the order (Pet. App. 53a-59a), the reserve requirements used to stabilize the volume of almonds marketed (*id.* at 59a-69a), and the administrative procedure for challenging the order (*id.* at 69a-70a).

petitioners received from the generic advertising purchased with their assessments. *Id.* at 8a-12a.[4]

5. In a later case, *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367, 1386 (1995), the Ninth Circuit, relying on its initial decision in this case, held that the AMAA's generic advertising programs for California peaches, nectarines, and plums violated the First Amendment under the *Central Hudson* test. This Court granted the Secretary of Agriculture's petition for a writ of certiorari in *Wileman Bros.* and ultimately reversed the court of appeals' decision on the merits, holding that the generic advertising programs at issue in that case did not violate the First Amendment. *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

After the Ninth Circuit's disposition of the remedial issues and entry of final judgment in this case, and while the certiorari petition in *Wileman Bros.* was pending before the Court, the Secretary of Agriculture also petitioned for a writ of certiorari on the First Amendment issue in this case. The Secretary suggested that, because *Wileman Bros.* provided "a more appropriate vehicle for resolution of the First Amendment issue," the Court should hold the petition in this case pending the disposition of the petition in *Wileman Bros.* See Pet. 16-17, *USDA* v. *Cal-Almond, Inc.*, No. 95-1879.

On June 27, 1997, two days after the Court issued its decision in *Wileman Bros.*, the Court granted the Secretary's petition in this case, vacated the Ninth Circuit's judgment, and remanded the case to the

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[4] This Court denied a petition for a writ of certiorari seeking review of the court of appeals' decision on sovereign immunity. *Cal-Almond, Inc.* v. *USDA*, 117 S. Ct. 72 (1996).

Ninth Circuit "for further consideration in light of [*Wileman Bros.*]." *Department of Agriculture* v. *Cal-Almond, Inc.*, 117 S. Ct. 2501.

On September 4, 1997, the court of appeals, citing *Wileman Bros.*, remanded the case to the district court with instructions to dismiss petitioners' First Amendment claim. Pet. App. 1a.[5]

ARGUMENT

The court of appeals' unpublished order remanding this case for dismissal in light of *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is correct, does not conflict with the decision of any other circuit, and does not present any issue of continuing significance, especially since the marketing order at issue in this case has been amended. No reason therefore exists for this Court to revisit so soon after *Wileman Bros.* the constitutionality of agricultural marketing orders that require the distributors of a commodity to share the costs of its generic advertising. Nor need the Ninth Circuit be directed, yet again, to give this case further consideration.

1. This Court held in *Wileman Bros.* that handlers may, as part of a regulatory program for the marketing of an agricultural product, be required to fund generic advertising for that product. The Court identified three factors that distinguish such marketing orders from laws that abridge the freedom of speech protected by the First Amendment. First, "the marketing orders impose no restraint on the freedom of any producer to communicate any message

[5] The court of appeals subsequently denied a petition for rehearing and suggestion of rehearing en banc, after calling for a response from the government. Pet. App. 356a.

to any audience." 117 S. Ct. at 2138. Second, the marketing orders "do not compel any person to engage in actual or symbolic speech," because the handlers "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 2138-2139. And third, the marketing orders "do not compel the producers to endorse or finance any political or ideological views," *ibid.*, much less any political or ideological views with which they disagree.

The almond marketing order in this case is distinguishable, for the same three reasons, from laws that have been held to violate the First Amendment. Indeed, the almond marketing order is even further removed from such unconstitutional laws than were the marketing orders in *Wileman Bros.*, because almond handlers have the choice either to contribute to the Almond Board's generic advertising program or to engage in their own creditable advertising under rules promulgated by the Secretary of Agriculture. In *Wileman Bros.*, three of the dissenting Justices observed that such a credit system, "[o]n its face, at least," is "a far less restrictive and more precise way to achieve the government's stated interests [in promoting an agricultural commodity], eliminating as it would much of the burden on [handlers'] speech without diminishing the total amount of advertising for a particular commodity." 117 S. Ct. at 2154 (Souter, J., dissenting) (contrasting the marketing orders in *Wileman Bros.* with, *inter alia*, the "marketing order[] for almonds").[6]

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[6] The dissenting Justices surely understood that any marketing order that gave handlers credit for their own advertising could permissibly be content-based. Otherwise, a business that handled almonds and multiple other products could re-

Petitioners nonetheless contend (Pet. 13) that the almond marketing order, because of its creditable advertising regulation, imposes a greater restraint on "the freedom of the producer to communicate the message of his choice to the public" than did the marketing orders in *Wileman Bros.* Petitioners are mistaken. An almond handler remains free to convey any message that it chooses in its advertising. See 7 U.S.C. 608c(10) (no marketing order may "prohibit[], regulat[e], or restrict[] the advertising of any commodity or product"). The creditable advertising regulation simply limits the types of advertising for which an almond handler may receive credit against its assessment for the Almond Board's generic advertising and promotion program. The handler has the option of paying its entire assessment without engaging in any creditable advertising of its own—which was the only course available to the fruit handlers under the marketing orders in *Wileman Bros.* The almond marketing order thus involves less compulsion to engage in commercial speech than did the marketing orders declared to be constitutional in *Wileman Bros.*

Relying on Justice Souter's dissent in *Wileman Bros.*, petitioners argue (Pet. 16 & n.10) that the almond marketing order is unconstitutional under the three-part test announced in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447

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ceive a credit against its Almond Board assessment for its advertising of all of those products, whether or not the advertising had anything to do with almonds. Such a content-neutral credit, which petitioners suggest (Pet. 14) is the only even arguably permissible credit, would not serve the governmental interest underlying the marketing order of promoting a particular commodity.

U.S. 557 (1980), for reviewing restrictions on commercial speech. As the *Wileman Bros.* majority made clear, however, *Central Hudson*, a case involving a *restriction* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech. See 117 S. Ct. at 2141 ("It was therefore error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising."). The mere fact that petitioners could satisfy their "compelled funding" obligation either by paying the assessment, as in *Wileman Bros.*, or by engaging in creditable advertising does not bring this case within the reach of *Central Hudson*.

Nor do petitioners' complaints (Pet. 6, 17) about the efficacy of the almond promotion program advance their First Amendment claim. As this Court has held, arguments that "generic advertising may not be the most effective method of promoting the sale of these commodities" are irrelevant to resolving the legal issue of "whether being compelled to fund this advertising raises a First Amendment issue for [the Court] to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." *Wileman Bros.*, 117 S. Ct. at 2138.[7]

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[7] There is likewise no merit to petitioners' contentions (Pet. 14, 16) that the creditable advertising provisions are unconstitutional because the decision whether an advertisement receives credit is made by the Almond Board, a committee that includes petitioners' competitors. During the period at issue, the Almond Board was merely authorized to apply, in the first instance, the detailed criteria contained in the regulation to the advertisements submitted by handlers for credit. See 7 C.F.R. 981.441 (1992). A handler was entitled to appeal the Almond

2. Petitioners erroneously assert that the government previously took the position that "the creditable advertising provisions raise constitutional issues different from those raised by the mandatory advertising assessments in *Wileman Bros.*" Pet. 11; see also *id.* at 14-15. To the contrary, we indicated when this case was previously before this Court on the Secretary of Agriculture's petition for a writ of certiorari that both this case and *Wileman Bros.* presented the same First Amendment issue. See, *e.g.*, Pet. 14-15, *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879 ("the Ninth Circuit's decision on the First Amendment issue in this case warrants invoking this Court's jurisdiction, for the same reason as does the Ninth Circuit's decision on that issue in *Wileman Bros.*"); *id.* at 16 ("the First Amendment issue presented here and in *Wileman Bros.* warrants review by this Court"). We further argued, however, that "*Wileman Bros.* provide[d] a more appropriate vehicle for resolution of the First Amendment issue than [did] this case," both because most marketing orders, like that in *Wileman Bros.*, contain no provision for creditable advertising and because the creditable advertising provision at issue in this case had been revised significantly since the Ninth Circuit's decision. *Id.* at 15-16. We therefore urged the Court to hold the petition in this case for disposition "as appropriate in light of the disposition of the petition for a writ of certiorari in [*Wileman Bros.*]." *Id.* at 17. And that is what the Court chose to do.

Board's initial determination to the Secretary of Agriculture, who had final authority as to whether an advertisement would receive credit. See 7 C.F.R. 981.40(c).

3. Contrary to petitioners' assertion (Pet. 16), the constitutionality of the almond marketing order in this case does not, after *Wileman Bros.*, present any issue "of considerable importance" warranting the Court's review. Petitioners do not contend that the Ninth Circuit's unpublished order remanding the case for dismissal in light of *Wileman Bros.* conflicts with any decision of any other circuit. Nor is any such conflict likely to arise in the future because, as petitioners acknowledge (Pet. 17), the only marketing orders with creditable advertising provisions "operate within the confines of the Ninth Circuit." Petitioners also acknowledge (*id.* at 16-17) that the Secretary of Agriculture has promulgated only three such marketing orders in addition to the one at issue here, all of which involve creditable advertising regulations that vary both from one another and from the regulation challenged in this case. See 7 C.F.R. 932.45(a)(2) (California olives); 7 C.F.R. 982.58 (filberts grown in Oregon and Washington); 7 C.F.R. 989.53(b) (California raisins).

Moreover, as noted in our certiorari petition two years ago in this case, since the Ninth Circuit decided petitioners' challenge to the creditable advertising regulation more than four years ago, the Secretary of Agriculture has significantly revised that regulation. See 59 Fed. Reg. 35,222 (1994) (adopting final rule revising creditable advertising regulation). The revised regulation eliminates many of the previous restrictions on the types of advertising for which an almond handler may receive credit against its assessment. See *id.* at 35,226-35,227. The constitutionality of the former regulation is thus of no con-

tinuing importance. And the constitutionality of the revised regulation is not at issue in this case.[8]

4. Petitioners request (Pet. 19), in the alternative, that the Court remand the case once more to the Ninth Circuit "for serious consideration in light of *Wileman Bros.*," because the Ninth Circuit may have "erroneously understood this Court's [earlier] remand order as a judgment on the merits against petitioners." Petitioners apparently base that supposition on the panel's "summar[y] dispos[ition]" (*id.* at 20) of their First Amendment claim on remand and on the panel's failure to request additional briefing from the parties before doing so.[9]

Petitioners are grasping at straws. This Court's remand order directed the Ninth Circuit, in clear and unambiguous terms, to give this case "further con-

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[8] Petitioners contend (Pet. 18 n.11) that the revised regulation presents the same "serious constitutional defects" as did the former regulation. But this Court is not the appropriate forum in which to raise arguments, not addressed by the courts below, concerning the content or the constitutionality of the revised regulation. We note that petitioners are already challenging the revised regulation in separate proceedings in federal district court. See *Cal-Almond, Inc.* v. *USDA*, No. CV-F-98-5049 REC (E.D. Cal. filed Jan. 13, 1998); *Cal-Almond, Inc.* v. *USDA*, No. CV-F-98-5298 REC (E.D. Cal. filed Mar. 26, 1998).

[9] We note that more than two months elapsed between this Court's order remanding this case to the Ninth Circuit and the Ninth Circuit's order remanding the case to the district court for dismissal. At no point during that period did petitioners file a motion with the court of appeals requesting the opportunity to file additional briefs on the applicability of *Wileman Bros.* to this case. The court could reasonably assume in such circumstances that petitioners had nothing further to say on the subject.

sideration in light of *Glickman* v. *Wileman Bros.*" *Department of Agriculture* v. *Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). There is no reason to conclude that the Ninth Circuit failed to comprehend that straightforward directive. It is more reasonable to conclude that the panel, after reviewing its earlier decision in light of the proper analysis provided by *Wileman Bros.*, determined that petitioners' First Amendment claim was without merit and did not warrant any further expenditure of the parties' and the courts' resources. The full Ninth Circuit, after considering petitioners' request for rehearing en banc and the government's response, left the panel's disposition of the case undisturbed. Pet. App. 356a. This Court should do so as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1998

Supreme Court, U.S.
FILED
AUG 12 1998
OFFICE OF THE CLERK

No. 97-1935

In the Supreme Court of the United States

OCTOBER TERM, 1997

CAL-ALMOND, INC., CARLSON FARMS, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., AND FRAZIER NUT FARMS, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government's Brief in Opposition strives to say as little as possible about the substantial First Amendment issue presented in this case, which is fundamentally different from the issue resolved by this Court in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). The question presented is whether a federal marketing order may, consistent with the First Amendment, confer or withhold a credit against a mandatory monetary assessment on the basis of the content of an almond handler's own brand advertising.

In *Wileman Bros.*, the federal marketing order established a mandatory assessment program that had no effect on a commodity handler's own speech. The program was not based on scrutiny of the handler's speech and it offered neither an incentive for speaking in one way nor a disincentive for speaking in another. The creditable advertising program in this case, on the other hand, is a system of rewards and penalties based on the content of the handler's own speech. If the handler's advertisements are approved by the Almond Board, then it receives a credit against its assessment. If the advertisements do not satisfy the Board — which is dominated by petitioners' largest competitor — the handler must pay the full assessment. The program thus not only compels speech but also allows a content-based judgment on an almond handler's speech by a non-neutral decisionmaker.

The Ninth Circuit did not expressly address the constitutionality of this program in light of *Wileman Bros.* — indeed, the court did not even accord petitioners the opportunity to brief the issue — despite a remand from this Court for that purpose. Petitioners ask this Court either to review the First Amendment issue presented here, which will have a broad effect on a number of other pending cases and marketing orders, or to remand the case again to the court of appeals for the full review of the merits originally contemplated by this Court.

1. Stripped of its inaccuracies and irrelevancies, the government's response is premised on the unsupported assertion (Opp. 10) that this case is governed by the Court's decision in *Wileman Bros.*, "because almond handlers have the choice either to contribute to the Almond Board's generic advertising program or to engage in their own creditable advertising under rules promulgated by the Secretary of Agriculture." Based on this "option," the government contends that the creditable advertising program for almonds "involves less compulsion to engage in commercial speech than did the marketing orders declared to be constitutional in *Wileman Bros.*" *Id.* at 11.

But the government never addresses the arguments in the Petition (at 11-19) demonstrating that the reasoning of *Wileman Bros.* compels the conclusion that the creditable advertising program at issue in this case violates the First Amendment. In *Wileman Bros.*, the Court held that marketing orders that "impose [a] restraint on the freedom of any producer to communicate any message to any audience" or that "compel any person to engage in any actual or symbolic speech" should be subjected to heightened First Amendment scrutiny. 117 S. Ct. at 2138 (footnotes omitted).

In this case, the creditable advertising program for almonds imposes a restraint on the freedom of an almond handler to communicate the message of his choice to the public. Some almond advertisements will entitle the handler to a monetary credit and others will force the handler to pay the full assessment. The government's response that an "almond handler remains free to convey any message that it chooses in its advertising" (Opp. 11), simply ignores the constitutional significance of government-imposed financial incentives and disincentives, which constitute "a significant burden on expressive activity." *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 469 (1995); see *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950) ("indirect 'discouragements' undoubtedly have the

same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes").

And the government completely ignores the fact that, unlike the marketing order in *Wileman Bros.*, the creditable advertising program for almonds relies on content-based scrutiny of private speech by a government entity. As noted in the Petition (at 14), a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc.* v. *Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Finally, the content-based restrictions on almond advertisements are unconstitutionally administered by a non-neutral decisionmaker — a Board dominated by one company, Blue Diamond, whose interests are diametrically opposed to those of petitioners.[1] App. 165a; see *Air Line Pilots Ass'n* v. *Miller*, 118 S. Ct. 1761 (1998) (First Amendment requires "'an impartial decisionmaker'").

Thus, contrary to the government's assertion (Opp. 11-12), the substantial factual distinctions between the creditable marketing order here and the marketing orders reviewed in *Wileman Bros.* require application in this case of the heightened standard of review articulated by the Court in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*,

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[1] The government's only response to the constitutional infirmity of a biased decisionmaker administering the creditable advertising program is to suggest that an almond handler can always appeal each of the adverse decisions of the Almond Board to the Secretary (Opp. 12-13 n.7). This is hardly an adequate solution. In addition to being impractical (the burden of appealing each adverse determination of the Board would be heavy), it provides no relief from the unconstitutional regulations themselves. Moreover, this Court has never held that the right to appeal from a non-neutral decisionmaker is sufficient to satisfy the First Amendment.

447 U.S. 557 (1980). The government's erroneous attempt to apply reflexively the less exacting standard applied in *Wileman Bros.*, without considering the factual differences of this case, simply illustrates the hazard of attempting to "draw[] bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); see also J. Stevens, *The Freedom of Speech*, 102 YALE L. J. 1293, 1300 (1993) ("First Amendment law has developed into an elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication").

The Ninth Circuit previously held that the Almond Marketing Order cannot survive scrutiny under *Central Hudson* (Pet. App. 41a-53a). Significantly, the government does not dispute that once the content-based restrictions on creditable advertising are subjected to scrutiny under the *Central Hudson* test, they cannot be upheld.

2. The distinctions between the Almond Marketing Order and the marketing orders in *Wileman Bros.* were substantial enough to cause the Solicitor General to urge the Court to decide *Wileman Bros.* on the merits — but not this case. See Pet. 15-16.

The government, however, now seeks to disavow the thrust of its earlier filings in this case (Opp. 13). The Solicitor General's petition for certiorari stated explicitly that "the Ninth Circuit's decision on the First Amendment issue in this case turned in part on certain aspects of the creditable advertising regulation then in effect" that were not present in *Wileman Bros.* U.S. Pet'n for Cert., *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879, at 13 (filed May 1996).

According to the government's petition (at 16), these distinctions affected "the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation in the marketing order for California

almonds." Thus, a decision by the Court on the creditable advertising program at issue in this case, "could leave uncertainty regarding the validity of numerous other statutorily created generic advertising programs that make no provision or different provision for creditable advertising." *Ibid.*

The features of the creditable advertising program that distinguished this case from *Wileman Bros.* when the Secretary was petitioning are the same features that distinguish this case from *Wileman Bros.* now and compel application of the *Central Hudson* standard to invalidate the creditable advertising program.

3. The government's efforts to minimize the importance of the question presented in this case (Opp. 14) are similarly unavailing. The Solieitor General does not dispute that the AMAA authorizes the Secretary to allow credits for individually purchased advertising by handlers of a wide variety of agricultural commodities regulated under the Act, see 7 U.S.C. § 608c(6)(I), and that the Secretary has, accordingly, adopted several creditable advertising regulations, see 7 C.F.R. § 932.45(a)(2), § 982.58(b), § 989.53(b). Thus, contrary to the government's submission (Opp. 14), the question presented is of considerable importance beyond the confines of this case.

The government nonetheless maintains that the case is not certworthy because the unpublished order of the court of appeals does not create any conflict in the circuits (Opp. 14). The fact that the court of appeals disposed of the important question presented in this case without a considered, published opinion (and without briefing on the merits by the parties) only supports our contention that the court did not consider this case properly on remand as directed by this Court.

Moreover, although the Ninth Circuit's order is unpublished, it will have a broad effect on a number of

constitutional challenges to creditable advertising regulations pending in the courts below. Indeed, the government has cited the court of appeals' order in support of its motions to dismiss pending constitutional challenges to creditable advertising programs. In *this* Court, the government treats the Ninth Circuit's decision as having little precedential importance, but in the lower courts the government cites the decision as definitive and conclusive.[2]

All of the cases involving creditable advertising are pending in courts in the Ninth Circuit, because all of the creditable advertising programs involve commodities grown in that region. Therefore, although there can be no circuit conflict on the constitutionality of such programs, there is a grave risk that this important constitutional question will be forever (and erroneously) resolved without any appellate court even receiving briefing and argument on the significance of *Wileman Bros.*

4. The government also relies on the recent amendment to the Almond Marketing Order (Opp. 14-15), arguing without elaboration that "the revised regulation eliminates many of the previous restrictions on the types of advertising for which an almond handler may receive credit."

As we noted in the Petition (at 18 n.11), however, although the restrictions on creditable advertising by

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[2] In the lower courts, the government has taken its position to the extreme of arguing that *Wileman Bros.* itself definitively resolved all First Amendment issues concerning generic advertising programs for agricultural commodities. In fact, the government has sought sanctions against counsel for raising constitutional objections to such programs based upon factual distinctions recognized in the *Wileman Bros.* decision. See U.S. Mem. in Support of Motion for Sanctions, *Gallo Cattle Co.* v. *U.S. Dep't of Agriculture*, No. CV-F-98-5488 (E.D. Cal.) (filed June 12, 1998).

California almond producers have been modified in some respects since this litigation was instituted, see 7 C.F.R. § 981.441 (1998), the changes did not eliminate the serious constitutional defects identified by petitioners in this case. Indeed, the new regulations are indistinguishable from a constitutional perspective. They still offer a credit for a handler's own advertisement if and only if it meets with the approval of the Almond Board.

The fact that the creditable advertising regulation has been modified in some respects should not be a bar to review by this Court. Indeed, if modification of the regulation were a bar, then the constitutionality of the substance of the regulation would never be considered by this Court. The regulation has, as the government itself noted, been the subject of "numerous rulemaking actions to revise and update the creditable advertising and promotion program to address changing circumstances in the industry." 59 Fed. Reg. 35,222, 35,224 (1994). In all, "over twenty-five [Almond] Board recommendations have been made and adopted by the Secretary" concerning the almond marketing program, *id.* at 35,225, since the Almond Marketing Order was adopted in 1970.

In light of the frequency with which the creditable advertising program is amended, and the significant delay involved in litigating any legal challenge to the program — caused largely by the requirement that "administrative proceedings must be exhausted before parties may file suit in court," 59 Fed. Reg. at 35,223 — if each amendment to the program rendered pending legal challenges nonreviewable by this Court, then the important constitutional question presented in this case could never be resolved by this Court.

5. The government concludes with a mocking reference to our request for a remand, as an alternative to plenary review, observing that "[p]etitioners are grasping at straws." Opp. 15. What petitioners, in fact, seek is serious

consideration of the question presented by the court of appeals after full briefing by the parties. Petitioners would have been entitled to file briefs as a matter of course if this case had arisen after *Wileman Bros.*, and they should receive the same consideration now. The government's attitude seems to be that cases involving marketing orders are all alike, and not worthy of a court's attention. They are *not* all alike, and petitioners are entitled to be heard on their First Amendment claim.

In light of this Court's remand order, the substantial constitutional issue presented, and the perfunctory treatment of the question by the Ninth Circuit, a request for serious consideration based on briefing and argument in light of *Wileman Bros.* is a matter of fundamental fairness. It is a sad day when the substance of appellate argument — the right to brief a case — is so lightly dismissed as "grasping at straws."

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, plenary review should be granted. At a minimum, the Court should vacate the order below and remand with instructions to receive briefing and argument on the relevance of *Wileman Bros.* to this case.

Respectfully submitted.

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AUGUST 1998